

BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:

NEUTRAL TANDEM, INC., and
NEUTRAL TANDEM-ILLINOIS, LLC,

Complainants,

VS.

LEVEL 3 COMMUNICATIONS, LLC,

Respondent .

Verified Complaint and Request
for Declaratory Ruling
pursuant to Sections 13-515
and 10-108 of the Illinois
Public Utilities Act.

Chicago, Illinois
May 23rd, 2007

Met, pursuant to notice, at 9:30 a.m.

BEFORE:

MR. IAN BRODSKY, Administrative Law Judge

APPEARANCES :

JENNER & BLOCK, by
MR. JOHN HARRINGTON
MR. MATT BASIL
One IBM Plaza
330 North Wabash Street, 47th Floor
Chicago, Illinois 60611
(312) 22209350

appearing for Complainant;

1 APPEARANCES CONT'D:

2 VP & ASSOCIATES GENERAL COUNSEL, BROADWING
3 COMMUNICATION, LLC, by
4 MR. JOHN GOCKLEY
5 200 North LaSalle Street, 10th Floor
6 Chicago, Illinois 60601
7 (312) 895-8471

8
9 -and-

10 KELLELY, DRYE & WARREN, LLP, by
11 MR. HENRY T. KELLY
12 MS. BRETT FREEDSON
13 333 North Wacker Drive, 26th Floor
14 Chicago, Illinois 60606
15 both appearing for Respondent;

16
17 MR. MATTHEW L. HARVEY
18 MS. STEFANIE R. GLOVER
19 160 North LaSalle Street, Suite C-800
20 Chicago, Illinois 60601-3104
21 (312) 793-2877
22 for Staff of the ICC.

23

24

25

26

27

28

29

30 SULLIVAN REPORTING COMPANY, by
31 Amy M. Aust, CSR
32 License No. 084-004559

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I N D E X

<u>Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>Re-direct</u>	<u>Re-cross</u>	<u>By Examiner</u>
Sara Braack	293	352	360, 373	370	
Timothy Gates	386	395	418		
Jeffery Hoaag	420	423			

E X H I B I T S

<u>Neutral Tandem</u>	<u>For Identification</u>	<u>In Evidence</u>
No. 6	296	
No. 7	299	
No. 1, 2 and 6		384
No. 11		385

E X H I B I T S

<u>Level 3</u>	<u>For Identification</u>	<u>In Evidence</u>
No. 1 and 1.1		295
No. 16	366	369
No. 2 and 2.1		395

E X H I B I T S

<u>Staff</u>	<u>For Identification</u>	<u>In Evidence</u>
1	422	422
2	412	

1 JUDGE BRODSKY: I now call Docket 07-0277.
2 This is Neutral Tandem versus Level 3 Communications.
3 This is Day 2 of the trial. Let's just get the
4 appearances, for the record, please.

5 MR. HARRINGTON: Good morning, your Honor.
6 John Harrington and Matt Basil for the plaintiff,
7 Tandem.

8 MR. KELLY: Your Honor, Hank Kelly and Brett
9 Freedson with Kelley, Drye & Warren on behalf of
10 Level 3 Communications.

11 MR. GOCKLEY: And John Gockley, G-o-c-k-l-e-y,
12 on behalf of Level 3.

13 MR. HARVEY: For the Staff of the Illinois
14 Commerce Commission, Matthew L. Harvey and Stephanie
15 R. Glover, 160 North LaSalle Street, Suite C-800,
16 Chicago, Illinois 60601.

17 JUDGE BRODSKY: Okay. Thank you.

18 Now, yesterday afternoon I believe we
19 finished up with the Complainant's witnesses.

20 Just for the sake of completeness, was
21 there anything further from Complainant?

22 MR. HARRINGTON: Not in terms of witnesses or

1 testimony, your Honor, no.

2 JUDGE BRODSKY: Okay. Very good.

3 Mr. Kelly, are you ready to proceed?

4 MR. KELLY: Yes, your Honor.

5 Level 3 will call its first witness,

6 Ms. Sara Baack.

7 (Witness sworn.)

8 SARA BAACK,

9 called as a witness herein, having been first duly
10 sworn, was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY

13 MR. GOCKLEY:

14 Q Would you please state your name for the
15 record.

16 A Sara, S-a-r-a, Baack, B-, as in
17 boy, -a-a-c-k.

18 Q Ms. Baack, do you have before you a
19 document labeled Exhibit 1, Direct Testimony of Sara
20 Baack on behalf of Level 3 Communications, LLC?

21 A Yes, I do.

22 Q And does that document contain your correct

1 testimony in this matter?

2 A Yes, it does.

3 Q If I were to ask you those questions with
4 respect to what's in that document here and now would
5 your answers be substantively the same?

6 A Yes, they would.

7 Q And attached to your Exhibit 1, is there an
8 Exhibit 1.1?

9 A Yes, there is.

10 Q That's an exhibit that's referred to in
11 your direct testimony?

12 A Yes.

13 MR. GOCKLEY: At this time I move for admission
14 of Exhibit 1 and Exhibit 1.1, and tender the witness
15 for cross-examination.

16 JUDGE BRODSKY: Okay. Any objection?

17 MR. HARRINGTON: No objection to the admission,
18 your Honor.

19 MR. HARVEY: None from Staff, your Honor.

20 JUDGE BRODSKY: Okay. Then the exhibits will
21 be admitted as marked.

22

1 (Whereupon, Level 3 Exhibit
2 Nos. 1 and 1.1 were admitted
3 into evidence.)
4 JUDGE BRODSKY: And you may proceed with cross.
5 MR. HARRINGTON: Thank you, your Honor.
6 To get things started, may I approach?
7 JUDGE BRODSKY: You may.
8 MR. HARRINGTON: Unless Staff would like to go
9 first.
10 MR. HARVEY: No. Please, proceed, Counsel.
11 MR. GOCKLEY: Just no hovering, John, please.
12 BY MR. HARRINGTON:
13 Q Good morning, Ms. Baack.
14 A Good morning.
15 Q How are you?
16 A Fine.
17 Q I'm John Harrington.
18 We met before, correct?
19 A Yes.
20 MR. HARRINGTON: Your Honor, would like me to
21 use the microphone, or are we sufficiently audible?
22 JUDGE BRODSKY: I can hear you.

1 THE REPORTER: Could you speak up a little.

2 MR. HARRINGTON: Sure. Of course.

3 BY MR. HARRINGTON:

4 Q Ms. Baack, I'm handing you what --

5 actually -- I'm sorry.

6 MR. HARRINGTON: Your Honor, I'd ask that this
7 be marked. These are Level 3's responses to Staff's
8 data requests that I've handed the witness. And I'd
9 ask that they be marked as Neutral Tandem Exhibit 6.

10 JUDGE BRODSKY: Okay.

11 (Whereupon, Neutral Tandem
12 Exhibit No. 6 was marked for
13 identification, as of this
14 date.)

15 BY MR. HARRINGTON:

16 Q Ms. Baack, I've handed you what has been
17 marked as Neutral Tandem Exhibit 6.

18 Do you recognize this as a copy of
19 Level 3's answers and objections to Staff's data
20 requests in this case?

21 A That's what it appears to be.

22 Q Okay. And did you personally participate

1 in the preparation of these answers and objections?

2 A I participated in answers and objections
3 that were originally submitted in the State of New
4 York.

5 Q Okay. So is that a "no"?

6 A Specifically for these Illinois, no.

7 Q Okay. Let me direct your attention at the
8 outset to the very first answer on Page 3 JZ 10.018.

9 Do you see that?

10 A Yes.

11 Q Do you see at the bottom you're listed as
12 the responsible person?

13 A Mm-hmm.

14 Q Are you prepared --

15 MR. GOCKLEY: Your Honor, I'm going to object
16 to this question. It's beyond the scope of her
17 direct testimony.

18 MR. HARRINGTON: I'm asking about the discovery
19 responses. She's the responsible person.

20 MR. GOCKLEY: She hasn't -- I don't think she
21 referred to any of the data request responses in
22 preparation of her testimony. This is

1 cross-examination.

2 MR. HARRINGTON: This will be -- their answers
3 will be used to cross-examine her with respect to her
4 testimony. I'm laying foundation that she actually
5 is the responsible person for these answers. These
6 will be used to impeach her testimony.

7 JUDGE BRODSKY: Proceed.

8 MR. HARRINGTON: Thank you.

9 BY MR. HARRINGTON:

10 Q You say that you were listed as the
11 responsible person with respect to that answer?

12 A Yes.

13 Q And if you'll just flip through the
14 remaining pages, do you see that you are listed as
15 the responsible person with respect to all of the
16 answers in the case?

17 A Yes.

18 MR. HARRINGTON: Your Honor, may I approach
19 again?

20 JUDGE BRODSKY: You may.

21 MR. HARRINGTON: Your Honor, I've shown the
22 witness a copy of the answer of Level 3

1 Communication, LLC, in this case. And I would ask
2 this be marked as Neutral Tandem Exhibit 7.

3 (Whereupon, Neutral Tandem
4 Exhibit No. 7 was marked for
5 identification, as of this
6 date.)

7 BY MR. HARRINGTON:

8 Q Ms. Baack, you are generally familiar at
9 least with Neutral Tandem's allegations in this
10 complaint, are you not?

11 A Yes.

12 Q And you were at least generally familiar
13 with Level 3's responses to Neutral Tandem's
14 allegations in this complaint, are you not?

15 A Yes.

16 Q Okay. Let me direct your attention on
17 Exhibit 7 to Page 2.

18 A That's this thing, the binder?

19 Q Yes. Exhibit 7 is the answer.

20 Paragraph 4, do you see that?

21 A Mm-hmm.

22 Q And do you see that, generally just for

1 your understanding, that Paragraph 4 is a restatement
2 of Neutral Tandem's allegations followed by Level 3's
3 answers?

4 If it's confusing, I'll just represent
5 to you that my understanding is that when your
6 counsel prepared Level 3's responses to Neutral
7 Tandem's complaint --

8 A Mm-hmm.

9 Q -- that they restated the allegations and
10 then after answer provided Level 3's answers.

11 Will you accept that subject to check?

12 A Yes.

13 Q Okay. And so what I'm trying to do is
14 rather than show you our complaint and your answers
15 separately, to streamline these questions I'm going
16 to ask questions about the allegation in Paragraph 4
17 in Level 3's answer.

18 Do you understand?

19 A I mean, if you're planning to ask me about
20 Section 10.108 on 13.515 of the PUA, I don't know
21 what that is.

22 Q Well, let me ask you then, you are aware,

1 at least reading it, that Neutral Tandem has brought
2 claims based under Section 514 of the Illinois Public
3 Utilities Act, are you not?

4 A I'm aware that Neutral Tandem has brought
5 claims and is referring to some different state law
6 statutes for the basis, but I don't know --

7 Q The specifics?

8 A Right.

9 Q Okay. Well, let me direct your attention
10 to the last sentence of Level 3's answer.

11 MR. GOCKLEY: Which paragraph?

12 MR. HARRINGTON: Paragraph 4.

13 THE WITNESS: Okay.

14 BY MR. HARRINGTON:

15 Q Do you see the statement, Level 3 further
16 states that pursuant to the expressed terms of 13-504
17 (sic) of the PUA, Section 13-514 does not apply to
18 Level 3?

19 A Yes, that's what the sentence says. Yes.

20 Q Is it your understanding that that is Level
21 3's position in this case, that Section 13-514 of the
22 Illinois Act does not apply to Level 3?

1 A I don't know, Mr. Harrington, what Section
2 13.514 says. So I --

3 MR. GOCKLEY: Your Honor, I'm going to object
4 again. We've been here for ten minutes. We've yet
5 to have a question arising out of her direct
6 testimony that Level 3 -- she had nothing to with the
7 preparation of the answer to the complaint. I'm not
8 sure what benefit there is in questioning her about
9 the context.

10 MR. HARRINGTON: Your Honor, unless I'm
11 mistaken, this will be the only Level 3
12 representative, employee of Level 3 who will testify.
13 I can lay some additional foundation for why it's
14 appropriate to be asking Ms. Baack these questions or
15 for Level to provide another witness to testify about
16 the contents of a verified answer; but given
17 Ms. Baack is the only witness here, I'm at least
18 entitled to ask her some questions about Level 3's
19 position that are articulated in a sworn answer in
20 this case.

21 MR. GOCKLEY: But it's not her sworn answer.

22 MR. HARRINGTON: Well, Ms. Baack, let me -- I

1 don't mean to interrupt.

2 JUDGE BRODSKY: All right.

3 MR. HARRINGTON: I mean, respectfully, your
4 Honor, Mr. Klein (phonetic) verified these. He's
5 seated over there, but I don't think we can him this
6 date. So I really don't have a choice, but to ask
7 Ms. Baack.

8 MR. KELLY: But he can't ask Ms. Baack about a
9 legal conclusion in an answer where she says she's
10 not familiar with the statute and she's not familiar
11 with the allegations in the answer. I mean, he's
12 basically asking her to give a legal conclusion about
13 a statute that she is not familiar with.

14 MR. HARRINGTON: Oh, I absolutely did not.
15 Your Honor, I'm not asking at all for a legal
16 opinion. I'm asking if that sentence accurately
17 represents Level 3's position in this case to her
18 understanding. And if she has no understanding, then
19 that is what it is basically and I'll move on; but we
20 have -- we are -- they've taken a position regarding
21 the applicability of Section 13-514. It's very
22 important in this case. They've put up one business

1 person to testify. We're entitled to inquire about
2 Level 3's position in this case.

3 JUDGE BRODSKY: Okay. My sense was that it was
4 beginning -- or in part asking for a legal
5 conclusion. And to that extent, I'm going to sustain
6 the objection.

7 If you are limiting your questions to
8 what Level 3's position is with respect to -- well,
9 what Level 3's position is as their business
10 decision, then I'll let you proceed along those
11 lines.

12 MR. HARRINGTON: Okay. I apologize if the
13 question was inartfully phrased. I'll try to ask
14 similar information through -- with the other
15 exhibit.

16 MR. KELLY: Perhaps we can short-circuit some
17 of this. Level 3 will stipulate that they have in
18 excess of 37,000 access lines.

19 MR. HARRINGTON: In excess of 35,000 (sic).

20 So, if I understand, is Level 3
21 stipulated to the applicability of Statute 514 of the
22 Public Utilities Act.

1 MR. KELLY: No, we're stipulating to the number
2 of access lines.

3 MR. HARVEY: I think what they're stipulating
4 to is that they are not entitled to any exemption
5 from Section 13-514 under Section 13-504.

6 Is that a fair characterization?

7 MR. KELLY: That would be a fair
8 characterization.

9 MR. HARRINGTON: That's fair.

10 Is Level 3 also stipulating with
11 respect to its subsidiary Broadway?

12 MR. KELLY: No.

13 MR. HARRINGTON: Okay. Then I'll have question
14 on Broadway, but I won't have further questioning on
15 the topic of Level 3.

16 JUDGE BRODSKY: Okay.

17 BY MR. HARRINGTON:

18 Q Ms. Baack, let me direct your attention
19 back to Level 3's discovery requests -- or responses
20 to Staff's discovery requests in this case. And let
21 me direct your attention to Page 9 listed as JZ 1.03
22 (sic).

1 A Mm-hmm.

2 Q Would you take a moment to look that over,
3 please, and tell me when you've had a chance to do
4 so.

5 A Okay.

6 Q And do you see at the bottom you are listed
7 as the responsible person with respect to the
8 information contained in Level 3's response to
9 JZ 0.103?

10 A Yes.

11 Q Okay. Do you see that JZ 0.103 seeks
12 certain information regarding the number of
13 subscriber access lines for affiliates of Level 3
14 Communications?

15 A Yes.

16 Q Broadway is an affiliate of Level 3
17 Communications, is it not?

18 A Yes, it is.

19 Q Okay. And Broadway receives traffic from
20 Neutral Tandem in the State of Illinois, does it not?

21 A I believe so.

22 Q And to the extent that Level 3 has made

1 certain representations regarding its willingness or
2 unwillingness to receive traffic from Neutral Tandem,
3 those are some issues that apply to Level 3's
4 subsidiary, Broadway, do they not?

5 A They do.

6 Q Okay. Do you see that Level 3 -- and so
7 you understand, again, that JZ 103 basically asks for
8 the number of other -- subscriber access lines for
9 Level 3's affiliates, correct?

10 A Mm-hmm.

11 Q Let me direct your attention --

12 JUDGE BRODSKY: Was that a "yes"?

13 THE WITNESS: Yes. Sorry.

14 BY MR. HARRINGTON:

15 Q All right. Now, let me direct your
16 attention to Exhibit 1 of Level 3's responses. It's
17 right after Page 14.

18 A Mm-hmm. Yes.

19 Q And do you see the list of affiliates and
20 subsidiaries of Level 3 Communications, LLC?

21 A Yes.

22 Q And do you see a number of Broadway

1 affiliates listed there?

2 A Yes.

3 Q Okay. And so, again, you did testify, but
4 I want to make sure you saw it here as well, Broadway
5 is an affiliate of Level 3 Communications, correct?

6 A Yes.

7 Q Okay. Let me turn you back to JZ 103?

8 MR. GOCKLEY: Your Honor, may I ask
9 Mr. Harrington a question.

10 Are you getting at the same issue with
11 respect to Level 3?

12 MR. HARRINGTON: You guys said you wouldn't
13 stipulate to the exemption of 504. We will
14 demonstrate that Broadway has a necessary -- to be
15 covered by 504.

16 MR. GOCKLEY: We will so stipulate.

17 MR. HARRINGTON: Fair enough.

18 Let's have a complete stipulation on
19 the record if we could.

20 Is Level 3 stipulating that any --
21 that its subsidiary, Broadway -- and I realize to the
22 extent any Broadway entity is covered by

1 attachment -- or Exhibit 1 where the --

2 JUDGE BRODSKY: Why don't you just read them.

3 MR. HARRINGTON: Sorry. I lost my place.

4 MR. GOCKLEY: Let me tell you what we will

5 stipulate to.

6 MR. HARRINGTON: Okay. Please. Thank you.

7 MR. GOCKLEY: We will stipulate that Broadway

8 Communications, LLC, which is the certificate holder

9 in the State of Illinois, has subscriber access lines

10 in excess of 35,000.

11 MR. HARRINGTON: In the state of Illinois?

12 MR. KELLY: In state of Illinois.

13 MR. GOCKLEY: And we will further stipulate

14 that Level 3 Communications, LLC, has subscriber

15 access lines in excess of 35,000 subscriber access

16 lines in the state of Illinois as reported on Form

17 477.

18 MR. HARRINGTON: And I could go through and ask

19 about any other affiliates. My understanding is that

20 it's only Broadway and Level 3 at issue here, rather

21 than -- if we're willing to do this through

22 stipulation, I'll just ask counsel -- if it's okay

1 with you, your Honor -- whether there are any other
2 affiliates that receive traffic from Neutral
3 Tandem-Illinois?

4 MR. GOCKLEY: I don't know the answer to that
5 question.

6 MR. HARRINGTON: Then I'm going to have to at
7 least ask Ms. Baack about that because basically we
8 need to ensure that any affiliates that are to
9 receive traffic in Illinois are covered by Section
10 514.

11 I think that was the point of Staff's
12 data requests. The possible responsible person we
13 have a list. So I'm going to have to ask her that.

14 MR. GOCKLEY: But they're not party defendants
15 to this case.

16 MR. HARRINGTON: All subsidiaries are a party,
17 your Honor -- it's expressed in our complaint -- all
18 other subsidiaries. I mean, I'd rather not take the
19 time to have to go through this; but if we can't do
20 it by stipulation, then I'm going to have to find
21 out.

22 Your Honor, I might be able to ask

1 Ms. Baack a foundational question.

2 JUDGE BRODSKY: Hold on. Hold on. Hold on.

3 MR. KELLY: Level 3 Communications is the only
4 defendant party to this case. None of the other
5 affiliates are named as defendants in the case.
6 They're all separate -- separate organizations,
7 separate corporations. They have their own
8 shareholders, although they are fully -- or many of
9 them are wholly-owned, but not all of them are. Only
10 LL- -- Level 3 Communications, LLC, is a defendant in
11 this case.

12 MR. HARRINGTON: Your Honor, with due respect,
13 that is not an accurate characterization of our
14 complaint in light of the colloquy. And we're going
15 to have to move it in.

16 In Exhibit -- I'm reading from the
17 complaint, Neutral Tandem, LLC, collect -- pursuant
18 to Section 13-515 of the Illinois Public Utilities
19 Act and the Administrative affiliates, Neutral
20 Tandem, Inc., and Neutral Tandem-Illinois, LLC,
21 collectively by and from the counsel bring this
22 verified complaint and request for declaratory

1 relief, verified complaint, against Level 3
2 Communications, LLC, and its subsidiaries,
3 collectively Level 3.

4 JUDGE BRODSKY: Where are you reading?

5 MR. HARRINGTON: Could I approach, your Honor.

6 JUDGE BRODSKY: Approach.

7 MR. HARRINGTON: It's the last paragraph --
8 last sentence of the introductory paragraph.

9 JUDGE BRODSKY: Mr. Harrington, how would --
10 how would a subsidiary have notice of this complaint
11 in proceeding today?

12 MR. HARRINGTON: I don't think there's any
13 dispute that Level 3 subsidiaries are owned and
14 controlled by Level 3. There's no question and there
15 has been no dispute or allegation by Level 3 in any
16 other state where I believe we have made
17 substantially identical allegations. I am not aware
18 of any state in which Broadway has had to be
19 separately named; but -- so there's never been --
20 this issue has not been raised.

21 They have testified on half of
22 Broadway. They have submitted discovery, to my

1 recollection, on behalf of Broadway in other states.
2 I believe they have actual and legal notice quite
3 clearly here.

4 In addition, Mr. Kelly and I
5 stipulated early on in the process that service of
6 complaints, documents, and other items would be
7 appropriately served for notice purposes if it were
8 served between us. And I'm confident that this
9 document was served on Mr. Kelly.

10 MR. KELLY: As counsel for Level 3
11 Communications not for Broadway, not for any other
12 affiliates. I don't even know the affiliates of
13 Level 3 other than what's contained in the discovery
14 responses.

15 So I certainly, to be clear, wasn't
16 indicating that Mr. Harrington's service by e-mail to
17 me of a copy of a complaint entitled, Neutral Tandem,
18 Inc., versus Level 3 Communications, comma, LLC, is a
19 service of a complaint on all of the subsidiaries of
20 Level 3.

21 MR. HARRINGTON: Respectfully, your Honor, this
22 is sandbag. And we've done this in three or four

1 other states. This has not come up. So, perhaps,
2 they think this is another argument here.

3 Where this is headed is a filing of an
4 even more expedited complaint against Broadway under
5 the 48-hour notice provisions that I'm going cite;
6 but one way or the other, Broadway used to be focal
7 communications. It's a significant operator in
8 Illinois. And if Level 3 is -- believes that it's
9 going to avoid having to account for Broadway one way
10 other another through this tactic, it's not going to
11 work. It's just going to create more work for the
12 parties and the Commission. We think they have ample
13 notice.

14 MR. GOCKLEY: And, your Honor, other than
15 presenting the implication of a sandbag here, we've
16 already stipulated as to the subscriber access line
17 for Broadway.

18 What we're seeking to do here is to
19 avoid wasting our time and your time in running
20 through this laundry list of affiliates.

21 MR. HARRINGTON: And I agree with that, your
22 Honor. And that's why I asked that -- if there are

1 other affiliates in Illinois, again, we are -- we
2 have brought this complaint against Level 3 and its
3 subsidiaries and I believe -- and we can establish
4 all of this through cross if we need to.

5 I actually don't believe there are any
6 other others. Ms. Baack may have that information
7 factually available to her if I could ask her a
8 question about that and we may be able to
9 short-circuit all of this.

10 JUDGE BRODSKY: Where's your -- where's your
11 service list for the complaint?

12 Well, let me put it this way,
13 Mr. Harrington: If you can demonstrate that you've
14 served Broadway or their agents, whatever, with the
15 complaint and that they've had notice, then you can
16 proceed on this line. If not, you can't.

17 The day of trial is too late to give
18 them notice that there's a complaint happening. And,
19 you know, if that means that we have a 48-hour
20 complaint or some other expedited proceeding against
21 Broadway, that's -- you know, it may be unfortunate
22 if it was avoidable; but at the end of the day, they

1 need notice and an opportunity to be heard.

2 So if there's -- if you don't have
3 something that you can demonstrate that they have
4 been served with this material, then Broadway is just
5 not part of it.

6 MR. HARRINGTON: Understood, your Honor. And
7 obviously we did not realize this issue was coming up
8 until today. So I have not gone back through the
9 record to find that information. If it's okay with
10 your Honor, maybe the way to do this is best to
11 address this in our posthearing briefs. And we can
12 write -- I think you said you were going to keep the
13 record open.

14 I don't have information at the ready
15 because this is the first time they've raised this
16 issue in any jurisdiction and evidentiary hearing.
17 And so we -- I would need an opportunity to gather
18 whatever information we have and present it as
19 appropriate.

20 JUDGE BRODSKY: All right. Well, you know,
21 here we go again, this is the time to be presenting
22 the evidence.

1 So do you have a plan to --

2 MR. HARRINGTON: We'll do it in 48 hours, your
3 Honor. We'll submit a supplemental memorandum or a
4 supplemental submission regarding -- Broadway can
5 take notice to Broadway Communications or its agents
6 within 48 hours.

7 JUDGE BRODSKY: Well, that's, perhaps, fine to
8 demonstrate that service was or was not had upon
9 Broadway. If it was effective and you can
10 demonstrate that, that's fine because it's an
11 offshoot; but do you have a plan to provisionally
12 deal with the issue right now?

13 MR. HARRINGTON: I think what I can do is ask
14 Ms. Baack one or two questions based on my
15 understanding of the entities that really probably do
16 provide services here in Illinois and then we can
17 move on to another line of questioning.

18 JUDGE BRODSKY: All right. So for purposes of
19 the record, since essentially your -- the -- opposing
20 counsel's objection was sustained -- these couple
21 questions will be considered an offer of proof. And
22 if you fail to demonstrate that service was effective

1 upon Broadway, then the offer of proof materials will
2 simply die of any effect going forward.

3 MR. HARRINGTON: And, your Honor, just so I'm
4 clear on what we will -- what and when we should
5 demonstrate this, I would respectfully suggest that
6 the most efficient way to do this would be in our
7 posthearing brief. If there is a need to do it more
8 expeditiously, like I said, we'd be happy to do that.

9 I would suggest it might be better to
10 do it in our posthearing brief. And then --

11 JUDGE BRODSKY: You know --

12 MR. HARRINGTON: Just to see how this would
13 play out, Your Honor. It would be in response --
14 because there will be two rounds of briefing --
15 whether they are taking issue in their response at
16 posthearing brief, which I think would be around
17 June 11th or so, with Broadway being part of this
18 case. If they are taking such issue, then we'll have
19 to bring a new matter under more expedited
20 procedures.

21 JUDGE BRODSKY: Okay. First of all, please
22 take note of the -- that yesterday we had some

1 different dates. June 11th is way beyond the
2 deadline, just a caution about that.

3 But, also, the briefs have page
4 limitations on them. So rather than waste space in
5 your brief on this, I would prefer a separate motion
6 and separate responses if Level 3 wants to respond to
7 it. And it can -- you know, if it's appropriate if
8 you have the material to demonstrate it, then,
9 perhaps, there would be some reconsideration of that
10 issue.

11 And aside from that, we'll just take
12 the offer of proof right now and then move on.

13 MR. HARRINGTON: Okay. Thank you, your Honor.

14 BY MR. HARRINGTON:

15 Q Ms. Baack, let me direct your attention to
16 Exhibit 1 to Level 3's discovery responses in this
17 case, which I think was Exhibit -- Neutral Tandem 6
18 after Page --

19 A This one?

20 Q Right. After Page 14.

21 A Mm-hmm. Yes.

22 Q We discussed Broadway Communications -- if

1 you would, take a look through the remaining list of
2 affiliates. And if you could let me know whether, to
3 your knowledge, any of those entities receive traffic
4 from Neutral Tandem-Illinois.

5 A I don't know.

6 Q You don't know. Okay.

7 Let me direct your attention then back
8 to Level 3's response to Staff JZ 0.104 A, Page 10.

9 Do you see that?

10 A Yes.

11 Q And do you see that Staff has asked whether
12 Level 3 has any agreements with originating parties
13 that require such parties to compensate Level 3 for
14 termination services when the originating party used
15 third-party agreement providers?

16 Do you understand that to be asking
17 whether Level 3 had -- receives -- it has any
18 agreements pursuant to which it receives compensation
19 from originating carriers when traffic is solicit to
20 Level 3 pursuant to a transit arrangement?

21 A Yes, I understand the question.

22 Q Okay. And do you see Level 3's response

1 that Level 3 has no such agreements?

2 A Yes, I do.

3 Q Do you see that in the next sentence
4 Level 3 is purported to answer this question on
5 behalf of affiliates, including Broadway?

6 A Yes.

7 Q And do you see that Level 3 has answered
8 its questions on behalf of its affiliates, including
9 Broadway, by indicating that certain of its
10 affiliates and entities, including Broadway, having
11 had such an agreement?

12 A Yes. And I believe those agreements cover
13 about five percent of the transit traffic.

14 Q We'll get do that. So you'll get a chance
15 to say what I know you're going to say about that,
16 but I'll ask you that in a minute.

17 It is true, is it not, that Broadway,
18 Level 3's affiliate, has agreements pursuant to which
19 it receives compensation from originating carriers in
20 a transit context from a number of cellular carriers?

21 A Yes, from the ones indicated here.

22 Q And those are U.S. Cellular, Sprint,

1 Cingular and T-Mobile, correct?

2 A Yes.

3 Q Those are major cellular carriers in
4 Illinois, are they not?

5 A I would assume so, yes.

6 Q And it says, Certain wireless carriers
7 including those listed carriers that you named.

8 Are there other wireless carriers?

9 A Not that I'm aware of. I believe there
10 used to be an agreement with Verizon that Verizon
11 terminated.

12 Q Okay. And do you see that the answer that
13 Level 3 gives on behalf of its affiliates, including
14 Broadway, actually says that Level 3 further states
15 that it's affiliates, including Broadway, have these
16 types of agreements.

17 Is Broadway the only affiliate to have
18 such agreements, or are there others?

19 A To my knowledge, Broadway is the only
20 affiliate that has such agreements.

21 Q Okay. And, as we said before, Level 3
22 actually does not have such agreements, correct?

1 A Correct.

2 Q And Level 3 has not sought to arrive at any
3 such agreements that would allow it to receive
4 compensation from originating carriers for traffic
5 that is transited through other carriers to
6 Broadway -- or to Level 3?

7 A No. For transited traffic, we don't seek
8 agreements because the catalyst for us seeking
9 agreements is typically that we want to directly
10 connect.

11 Q Right. And so when you don't directly
12 connect, you never sought such agreements?

13 A I wouldn't say never. I don't know the
14 answer -- I couldn't --

15 Q Do you have any personal knowledge of
16 efforts by Level 3 to reach such agreement?

17 MR. KELLY: Your Honor, that's the -- I'd ask
18 counsel to wait until finishes her answer and then he
19 can ask a question, please.

20 JUDGE BRODSKY: Was there more, Ms. Baack?

21 THE WITNESS: No, I don't think --

22 MR. HARRINGTON: I thought she was finished.

1 JUDGE BRODSKY: Go ahead.

2 MR. HARRINGTON: Could we have the question
3 bread back, please.

4 (Whereupon, the record was read
5 as requested.)

6 BY MR. HARRINGTON:

7 Q Do you have any personal knowledge of
8 efforts by Level 3 to reach agreements with
9 originating carriers for compensation by those
10 originating carriers to Level 3 for transited
11 traffic? Do you have any personal knowledge of
12 efforts by Level 3?

13 A I don't have personal knowledge.

14 Q Okay. Ms. Baack, you do have a copy of
15 your testimony, correct?

16 A Yes.

17 MR. KELLY: Are we done with the offer of
18 proof, your Honor, if I may ask?

19 MR. HARRINGTON: I'm moving on to her
20 testimony, yes.

21 JUDGE BRODSKY: Okay. So then we'll note for
22 the record that this is the end of the offer of

1 proof.

2 MR. HARRINGTON: Well, in fact, your Honor,
3 it's my fault because I moved on to questions
4 regarding compensation without indicating that I
5 ended the offer of proof.

6 I would say that my offer of pertained
7 to the questioning regarding her knowledge of any
8 affiliates, including Broadway -- or other than
9 Broadway that receive traffic in Illinois. The
10 response to JZ 104 is actually directly applicable to
11 the merits of the case. And I asked her a number of
12 questions about Level 3.

13 It actually also responded on behalf
14 of Broadway and others. So it's perfectly
15 appropriate to ask her questions about those, too.
16 That wasn't part of the offer of proof.

17 JUDGE BRODSKY: All right. Is there a
18 particular point that you can note off the top of
19 your head where the offer of proof ends?

20 MR. HARRINGTON: Yes. I believe when I asked
21 her if she knew whether any of these other affiliates
22 listed on Attachment 1 received traffic in Illinois

1 and she said she didn't know, that would be the end
2 of the offer of proof. And I apologize for not
3 having done that at the time.

4 JUDGE BRODSKY: So the questions about the -- I
5 believe it was --

6 Was it JZ 1.04?

7 MR. HARRINGTON: Correct, your Honor, on Page
8 10.

9 JUDGE BRODSKY: -- that was within the main --
10 your main -- your main case?

11 MR. HARRINGTON: Absolutely, your Honor. It
12 goes to some of the key issues in the case, namely,
13 originating compensation from originating carriers
14 the fact -- in our view, the fact that Level 3 has
15 not made such efforts, as Ms. Baack has testified,
16 but its own affiliates have is indicative, in our
17 view, of -- is indicative of Level 3's failure to
18 pursue compensation to which we believe there's ample
19 testimony they would otherwise be entitled to.

20 JUDGE BRODSKY: All right. Mr. Kelly or
21 Mr. Gockley, there were a few questions that seemed
22 to have followed that point. If it had been made

1 clear that the offer of proof had ended at the time
2 that Mr. Harrington would like to so label, would
3 there have been any objection to those subsequent
4 questions?

5 MR. GOCKLEY: No, your Honor.

6 JUDGE BRODSKY: No? Okay.

7 MR. HARRINGTON: Okay.

8 JUDGE BRODSKY: So we can then so label the end
9 point as you had indicated.

10 MR. HARRINGTON: Fine. And just to put a final
11 closure on this issue, your Honor, to be clear, as
12 follow-up to the colloquy and the stipulations
13 earlier, I would ask Mr. Kelly whether he accepted
14 service of this complaint on behalf of Broadway.

15 MR. KELLY: I don't think I have to testify to
16 that.

17 MR. HARRINGTON: It's certainly part of the
18 colloquy and stipulations at issue, your Honor.

19 JUDGE BRODSKY: Well, do you want to stipulate
20 to it, or do you not want to stipulate to it?

21 I don't think it's testimony either
22 way.

1 MR. KELLY: I'm not going to stipulate to that.

2 JUDGE BRODSKY: Very well.

3 MR. HARRINGTON: Mr. Kelly won't stipulate to
4 his -- who he accepted service on behalf of?

5 MR. KELLY: That's right.

6 MR. HARRINGTON: Okay.

7 BY MR. HARRINGTON:

8 Q Ms. Baack, you do have a copy of your
9 testimony in front of you, correct, and that has
10 already been marked, I believe, as Exhibit No. 1?

11 A Yes, I do.

12 MR. HARRINGTON: Matt, do you need other copy?

13 MR. HARVEY: Oh, no, I'm fine. Thank you.

14 BY MR. HARRINGTON:

15 Q Let me direct your attention to Page 7 of
16 your testimony, please.

17 A Yes.

18 Q Beginning at Line 14 beginning, Even using
19 Neutral Tandem's definition of carrying over to
20 the -- simply there is no doubt that tandem transit
21 services are available from other alternative
22 carriers.

1 Do you see that?

2 A Yes.

3 Q So it is your testimony that other
4 nonincumbent carriers provide candid transit services
5 in Illinois?

6 A Yes.

7 Q Let me direct your attention back to
8 Neutral Tandem 7, which was Level 3's answer to
9 Neutral Tandem's complaint in this case.

10 A I'm getting confused. It's this big one
11 again?

12 Q It's the one down -- it's Level 3's answer.

13 A Mm-hmm.

14 Q Do you see that?

15 Let me direct your attention to
16 Page 8, Paragraph 16. Do you see that?

17 Do you see that on Pa- --
18 Paragraph 16, the first sentence of the allegation
19 is, Neutral Tandem is telecommunications industries
20 only independent provider of tandem transit services.

21 Do you see that?

22 A Mm-hmm.

1 Q Would you read Level 3's answers to that
2 allegation, please.

3 A Upon information and belief, Level 3 admits
4 the allegations in Paragraph 16 of the complaint.

5 Q Thank you.

6 A But I need to --

7 Q I didn't ask --

8 A -- explain myself, please.

9 Q Well, Ms. Baack, you will have an
10 opportunity on redirect if Mr. Kelly wants to ask you
11 questions about that. I was just asking you to read
12 the question. You'll be redirected.

13 Let me direct your attention back to
14 Page 18 of your testimony.

15 Beginning on Line 13 in response to
16 the question, Is direct interconnection between
17 imbedded carriers the exception rather than the rule,
18 do you see your answer beginning on Line 13, The
19 circumstances under which direct interconnection
20 makes operational and economic sense to a particular
21 carrier vary and ultimately, you say, they are not
22 readily susceptible to a particular threshold, EG1,

1 DS1, 3DS1, DDS3, et cetera.

2 Do you see that?

3 A Yes, I do.

4 Q How many minutes of use on a monthly basis

5 are to be carried over DS1?

6 A For a DS1, it can range.

7 Q And what is your understanding of that

8 range?

9 A Zero to 400,000 minutes.

10 Q Okay. And you're not a network engineer,

11 correct?

12 That's your understanding from a

13 business perspective, right?

14 A Yes.

15 Q How many DS1's are in EDS3?

16 A Well, a DS3 can carry, I believe it's 673

17 DS0's. And a DS1 can carry 24 DS0's. So whatever

18 that math is.

19 Q We don't have to do the math.

20 There are a number of DS1's that go

21 into DS3, correct?

22 A Yes.

1 Q Okay. And DS1 carries about 400,000 use of
2 minutes on a monthly basis?

3 A I think that would be close to the absolute
4 maximum.

5 Q Do you have any basis to dispute the
6 testimony of Neutral Tandem's witnesses, Neutral
7 Tandem uses 56 million minutes of traffic volume a
8 month in Illinois?

9 A No, but I would dispute what percentage of
10 total transit traffic that represents.

11 Q Right. I didn't ask you that, Ms. Baack.
12 I asked if you had any basis for the factual
13 statement that Neutral Tandem delivers 56 million
14 minutes of traffic volume to Level 3 in Illinois?

15 Do you have a basis to dispute that
16 statement?

17 A To Level 3 and Broadway in Illinois.

18 Q Okay. Thank you.

19 Would you turn your attention to
20 Page 20 of your testimony, please, beginning on
21 Line 14 in response to the question about Level 3's
22 concern regarding the commercial agreements.

1 You say, It is important to remember
2 that the calls involved in this proceeding will
3 terminate Level 3 customers. We have no incentive or
4 desire to have our customers not receive those calls.

5 Do you see that?

6 A Yes.

7 Q You are familiar, aren't you, that Level 3
8 is disrupting the flow of traffic on networks in the
9 past? Aren't you?

10 A Is that relevant to the testimony?

11 Q Ms. Baack, I can ask the question, you are
12 familiar, aren't you, that Level 3 is disrupting the
13 flow of traffic on networks in the past?

14 MR. GOCKLEY: Then I'll make the objection.
15 Relevance.

16 MR. HARRINGTON: It's directly relevant to her
17 claim regarding their incentives.

18 JUDGE BRODSKY: Overruled. The witness may
19 answer.

20 MR. KELLY: I would like to also interpose a
21 question (sic). I think the question's vague as to
22 what she's talking about with respect to networks.

1 MR. HARRINGTON: Well, we will -- Ms. Baack
2 knows what I'm talking about and I can ask her and
3 she will --

4 JUDGE BRODSKY: Do I get to know what you're
5 talking about, too?

6 BY MR. HARRINGTON:

7 Q Ms. Baack, are you familiar with the
8 dispute between Level 3 and Cogent Communications?

9 You are familiar with that, aren't
10 you?

11 MR. KELLY: Object to relevance. It's not a
12 telecommunications dispute. It was a peering
13 relationship between Internet service providers.

14 MR. HARRINGTON: Well, your Honor, Mr. Kelly
15 can redirect rather than testify if he doesn't
16 believe this questioning about their prior blockage
17 efforts is relevant or helpful, but it's certainly a
18 relevant question given her testimony.

19 They said I didn't go to her
20 testimony, we're at her testimony and I'm asking her
21 impeachment about her testimony.

22 JUDGE BRODSKY: The objection's overruled.

1 BY MR. HARRINGTON:

2 Q Ms. Baack, Level 3 has disrupted the flow
3 of traffic on networks in the past, hasn't it?

4 A I object to the way you use --

5 MR. KELLY: Objection to the use of the term --

6 MR. HARRINGTON: Your Honor --

7 JUDGE BRODSKY: Wait. Stop. Stop. Stop.

8 Your objection was...?

9 MR. KELLY: Object to the use of the term
10 "network." It's vague. I don't know if he's talking
11 about a telecommunications network, some other
12 Internet network. The use of the term is vague.

13 MR. HARRINGTON: The term is absolut- --
14 that -- the term is not vague, your Honor. The
15 question's appropriate. They're clearly trying to
16 get her not to answer the question. She obviously
17 knows the answer. We should go through this line of
18 obviously relevant impeachment and they should
19 explain whatever they want to explain on redirect.
20 They've objected three times even though you've
21 overruled every objection and they keep objecting.

22 JUDGE BRODSKY: Are you -- well --

1 MR. HARRINGTON: I'll ask it --

2 JUDGE BRODSKY: Define the term "network."

3 MR. HARRINGTON: In this case, the flow of

4 traffic in a network at issue is on an Internet

5 backbone, but it absolutely has to do -- just to -- I

6 will lay a foundation with the questioning, but I'll

7 explain -- with the disruption of traffic to and from

8 end-users, both of Level 3 and at other companies.

9 And there is a well-documented history there that

10 I've asked Ms. Baack about in other states that they

11 obviously don't want us to ask or talk about here

12 notwithstanding her direct testimony that they have

13 no incentive to do this.

14 JUDGE BRODSKY: So...

15 MR. HARRINGTON: Their past prior conduct --

16 JUDGE BRODSKY: Ask your question in a clearly

17 defined --

18 MR. HARRINGTON: I will.

19 JUDGE BRODSKY: -- manner.

20 BY MR. HARRINGTON:

21 Q Ms. Baack, are you familiar with the

22 dispute between Level 3 and Cogent Communications

1 that occurred within the past couple of years?

2 A I am vaguely familiar with it.

3 Q You are vaguely familiar with it?

4 A Yes.

5 Q Tell me the extent of your familiarity with
6 it.

7 A My familiarity is based on the press
8 releases that Level 3 issued around that issue and
9 the situation where Level 3 decided some years ago to
10 de-peer certain Internet peers that were riding our
11 backbone for free. And Cogent was one of, I think,
12 19 or 20 Internet service providers that was riding
13 our backbone for free. Our traffic was out of
14 balance.

15 And so Level 3 made a decision in all
16 of those 20-some-ish cases to de-peer those other
17 providers if we could not reach new commercial terms
18 that appropriately govern the balance of traffic that
19 was going between ourselves and each of those
20 entities.

21 JUDGE BRODSKY: Ms. Baack, what do you mean
22 when you say "de-peer"?

1 MR. HARRINGTON: I can ask --

2 THE WITNESS: So --

3 MR. HARRINGTON: Please.

4 THE WITNESS: So de- -- effectively the
5 Internet's backbone consists of a whole bunch of
6 private data networks that are peered together.
7 Level 3 is one of the largest of these backbones.

8 And the way peering works is that
9 we -- that we agree with Sprint or with Verizon, who
10 now owns MCI, to connect our networks together and we
11 agree to exchange Internet traffic back and forth
12 between, let's say, the -- an eyeball that may be
13 sitting on one side -- you may be sitting at your
14 computer and looking up Google and you may be a
15 subscriber of MCI's Internet backbone and Google may
16 be a subscriber of Level 3's Internet backbone. So
17 for your request to get to Google, that request would
18 transmit across not just MCI's backbone, it would
19 eventually come on to Level 3's backbone to make that
20 request and then to pass the information back.

21 And peering is basically about the
22 agreement that big backbone companies set with each

1 other where they agreed to exchange traffic typically
2 at bill and keep. And the construct is that the
3 traffic exchange needs to be in balance.

4 So if the traffic is roughly in
5 balance, the traffic that Level 3's backbone points
6 to MCI -- let's say MCI is the peer in this case, to
7 the extent that that traffic is balanced, what
8 Level 3 sends to their backbone and what their
9 backbone sends to Level 3's backbone, then the
10 peering relationship is in balance and we're
11 considered to be peers.

12 What Mr. Harrington is referring to is
13 a situation over the development of the Internet
14 where Level 3 found itself supporting the traffic
15 volumes and demands from a lot of smaller Internet
16 peers that weren't in balance with us where we were
17 handling -- we were growing our backbone to support
18 all of their needs for their customers without any
19 reciprocity going on.

20 So we were incurring a bunch of costs
21 to support that traffic that we weren't getting paid
22 for. And we made a decision to approach those

1 carriers whose traffic was out of balance and not
2 transmitting to us under the terms of our peering
3 arrangements and to negotiate something that would
4 make more sense.

5 JUDGE BRODSKY: Okay. I'm going to cut you
6 because this went beyond the definition of de-peer.

7 THE WITNESS: Sorry.

8 JUDGE BRODSKY: Proceed, Mr. Harrington.

9 BY MR. HARRINGTON:

10 Q Ms. Baack, all of that explanation, helpful
11 as it may be, means that Level 3 -- Level 3
12 de-peering means other carriers have to pay to use
13 Level 3's network, right?

14 A Yes.

15 Q Okay. And, again, Cogent did not pay to
16 use Level 3's network, correct?

17 A Cogent was not paying us.

18 Q And as a result, Level 3 disrupted the flow
19 of traffic for Cogent end-users to and from the
20 Internet, correct?

21 A Well, the result of the disruption was
22 because Cogent didn't do anything about the months

1 and months of notice we gave them to renegotiate
2 something with us.

3 Q Sure. I understand. I didn't mean to cut
4 you off.

5 A Go ahead.

6 Q I understand that that's Level 3's position
7 about the events leading up to the disconnection;
8 but, in fact, Level 3 disrupted the flow of
9 traffic -- for whatever reason it may have felt it
10 had, Level 3 disrupted the flow of traffic on the
11 Internet preventing Cogent end-users from accessing
12 certain parts of the Internet, didn't they?

13 A Well, Cogent -- it's Cogent's
14 responsibility to make sure users can access the
15 Internet. Cogent can do that through the number of
16 other peering relationships that it has in place.

17 Q And, Ms. Baack, just, again, to answer my
18 question, Level 3 stopped -- disconnected its network
19 from Cogent's network because Cogent wouldn't take
20 Level 3's network, didn't they?

21 A Yes.

22 Q Okay. Thank you.

1 And as a result of that, Level 3's
2 president had to issue a public apology, didn't he?

3 A He apologized for the fact that disruption
4 occurred as a result of Cogent not preparing to be
5 able to handle that traffic over its other peering
6 relationships, which it should have done because we
7 gave them ample notice.

8 Q So your testimony is that the apology was
9 not for Level 3's actions in that case?

10 A No, that's not what I'm testifying.

11 Q But you just said he apologized for
12 Cogent's failure --

13 A He apologized for the disruption caused by
14 Cogent's failure to make other arrangements for that
15 traffic to run across different peering relationships
16 on Cogent's side. Cogent is the responsible party
17 for making sure its users can access the Internet.

18 Q You know, I --

19 A It's not Level 3's responsibility.

20 Q I understand that, Ms. Baack.

21 All I'm asking you is whether
22 Level 3's president apologized for Level 3's actions

1 in that case publicly?

2 MR. KELLY: Objection. Asked and answered
3 twice.

4 MR. HARRINGTON: Well, it actually hasn't been
5 answered. That's the problem, your Honor. We've
6 heard a lot about Level 3's position in that dispute.
7 What I'm asking the witness is whether,
8 notwithstanding their position in that dispute,
9 Level 3's president issued a public apology as a
10 result of Level 3's actions in that case.

11 MR. KELLY: And she answered that question and
12 said he apologized and explained what the apology
13 was. That was --

14 MR. HARRINGTON: The question was asking what
15 the apology was for. I mean, this is really
16 disruptive, your Honor. It's a "yes or no" question
17 and it's subject she's given a "yes or no" answer to
18 in the past. All I'm looking for is the same "yes or
19 no" answer here and we can move on.

20 JUDGE BRODSKY: The witness may answer.

21

22 BY MR. HARRINGTON:

1 Q So I'll ask it again.

2 You are aware, are you not, that

3 Level 3's president issued a public apology as a

4 result of Level 3's actions in that case? Are you

5 not?

6 A I'm aware that Level 3's president -- I

7 just --

8 Q It's a "yes or no" question.

9 A No, it isn't.

10 Q Are you not?

11 A I don't mean --

12 MR. HARRINGTON: Your Honor, I'd ask that the

13 witness be directed to answer the question. And if

14 she doesn't do it, I'll do the impeach.

15 MR. KELLY: Then I'll object to the question as

16 vague because she obviously can't answer the question

17 in the manner that it's being presented.

18 THE WITNESS: Let me try.

19 JUDGE BRODSKY: Before I rule on the objection,

20 Mr. Harrington, would you care to rephrase the

21 question?

22 MR. HARRINGTON: Okay.

1 BY MR. HARRINGTON:

2 Q Let's do it step by step.

3 Level 3's president issued a public
4 apology in that case, did he not?

5 A Yes, he did.

6 Q And Level 3's president publicly apologized
7 for Level 3's actions in that case, did he not?

8 A I don't know exactly what he said in the
9 apology.

10 MR. HARRINGTON: Okay. Now, your Honor, may
11 I -- may I approach?

12 JUDGE BRODSKY: Yes.

13 MR. HARRINGTON: Your Honor, I'm going to
14 tender to the witness a copy of the Connecticut
15 transcript. And we have a complete copy.

16 Yesterday when there were questions
17 about the transcript, I'm not sure if this had
18 already been -- I don't think it has and so it won't,
19 but I'll just give you a copy.

20 BY MR. HARRINGTON:

21 Q Ms. Baack, directing your attention to --
22 well, Ms. Baack, you testified recently on a similar

1 proceeding in Connecticut, did you not?

2 A Yes.

3 Q And you swore to tell the truth in that

4 case, did you not?

5 A Yes, I did.

6 Q And you did tell the truth in that case, I

7 assume, did you not?

8 A I believe I did, yes.

9 Q All right. Let me direct your attention to

10 Page 31 beginning on Line 1. I would ask you to read

11 Lines 1 through 5 of that Connecticut testimony

12 including -- that is your testimony, by the way, is

13 it not?

14 A Yes.

15 Q Would you please read Lines 1 through 5.

16 A So you were aware as well that Level 3's

17 president issued a public apology as a result of

18 Level 3's actions in that case.

19 Q Answer...?

20 A And I said, Yes, I'm aware of that.

21 Q Thank you.

22 Ms. Baack, let me direct your

1 attention to Page 24 of your testimony. Beginning on
2 Line 17 do you see the question, Witness Saboo
3 claimed it would take up to six months to rearrange
4 the transport and make switch translations to reroute
5 to AT&T. Please respond to that claim. And you
6 respond, Witness Saboo's sixth-month estimate is
7 unreliable and self-contradicted?

8 A Yes.

9 Q And you are not a network engineer, are
10 you?

11 A No, I'm not.

12 Q But you are aware that, in fact, Level 3
13 experienced call blocking in Chicago as a result of
14 its inability to obtain appropriate or adequate
15 trunking to receive calls from AT&T tandem less than
16 a year ago, aren't you?

17 A I am not aware of that.

18 Q Were you here yesterday for Mr. Saboo's
19 testimony?

20 A I was.

21 Q And did you hear him testify about that?

22 A I heard Mr. Saboo make claims about the

1 situation, yes.

2 Q Do you have any basis factually of your
3 personal knowledge as to anything Mr. Saboo had to
4 say about that?

5 A No, but I don't have any factual knowledge
6 to accept what he says about it.

7 Q Well, you certainly testified that Witness
8 Saboo's sixth-month estimate is unreliable and
9 self-contradicted, correct?

10 A Yes.

11 Q And so, again, you have no basis to dispute
12 the claim that it took four months for one carrier,
13 Level 3, to obtain adequate transport from AT&T in
14 Chicago less than a year ago, do you?

15 MR. KELLY: Objection, your Honor. Lack of
16 foundation. She's already testified that she doesn't
17 have information about that process.

18 MR. HARRINGTON: Lack of foundation? She just
19 testified she heard his testimony yesterday.

20 JUDGE BRODSKY: Proceed.

21 MR. HARRINGTON: Could I have the question read
22 back, please.

1 (Whereupon, the record was read
2 as requested.)

3 THE WITNESS: In that specific instance, I have
4 no reason to dispute that claim, but that's not what
5 I'm saying in this testimony.

6 BY MR. HARRINGTON:

7 Q I understand.

8 Do you have any factual basis then to
9 dispute Mr. Testimony (sic) -- Mr. Saboo's testimony
10 that it took Level 3 approximately four months to
11 augment its trunks in that instance?

12 MR. KELLY: Objection, your Honor. Already
13 asked and answered.

14 MR. HARRINGTON: It's a specific question about
15 the time frame and it's relevant to her testimony on
16 the six months.

17 MR. KELLY: He's already asked that question
18 and she's already given that answer.

19 JUDGE BRODSKY: Let me have the previous, not
20 this question and answer.

21 (Whereupon, the record was read
22 as requested.)

1 JUDGE BRODSKY: Follow-up with a question.

2 BY MR. HARRINGTON:

3 Q So, again, you have no factual basis to
4 dispute Mr. Saboo's testimony that less than a year
5 ago it took Level 3 four months to obtain adequate
6 transport capacity to receive traffic from AT&T in
7 Chicago, do you?

8 A No, but I also --

9 Q You haven't actually had --

10 A -- don't know the circumstances --

11 Q Well, Ms. Baack --

12 JUDGE BRODSKY: Let her answer.

13 MR. HARRINGTON: Okay.

14 THE WITNESS: I also don't know the
15 circumstances around any of that situation. If there
16 was a reason why Level 3 was not able to accept
17 traffic, that could have been a network planning
18 issue of someone trying to send traffic to us that we
19 weren't aware of. There could be many reasons why
20 something like that might materialize.

21 And so I'm -- I don't -- I cannot --

22 I'm not sure that I agree with you that that example

1 is necessarily applicable to what I'm talking about
2 in this testimony. That's all.

3 BY MR. HARRINGTON:

4 Q Okay. And so what investigation did you do
5 to determine with Level 3 -- within Level 3 whether
6 it was applicable?

7 What personal investigation have you
8 done to investigate this incident before providing --

9 A I don't know anything about this incident.

10 Q Okay. So you -- so, again, you have no
11 basis to dispute any of Mr. Saboo's testimony
12 regarding the traffic blockage that occurred in
13 August 2006 for Level 3?

14 MR. KELLY: Objection. Asked and answered.

15 MR. HARRINGTON: If she'll just say "I don't,"
16 we can stop.

17 MR. KELLY: Well, she's answered. I think
18 that's acknowledgment on his part that she's answered
19 the question, just not the way he wants.

20 MR. HARRINGTON: I think we know what the
21 answer will be based on her prior answers, but I
22 think it's fair to ask a close-ended question and get

1 a close-ended answer.

2 JUDGE BRODSKY: I think this is where we just
3 were a moment ago. So I'm going to sustain the
4 objection.

5 MR. HARRINGTON: Okay.

6 BY MR. HARRINGTON:

7 Q Oh, and, Ms. Baack, you don't have any
8 basis to dispute the fact that Neutral Tandem
9 actually serves 19 different carriers in Illinois, do
10 you?

11 A No.

12 Q Okay.

13 MR. HARRINGTON: Thank you. No further
14 questions.

15 MR. HARVEY: Just a couple, your Honor.

16 JUDGE BRODSKY: Please proceed.

17 CROSS-EXAMINATION

18 BY

19 MR. HARVEY:

20 Q Ms. Baack, my name's Matt Harvey. I
21 represent the Staff of the Commerce Commission in
22 this proceeding. And I'm going to -- first of all,

1 Baack is okay, like Johann Sebastian --

2 A Yes.

3 Q -- or the beer?

4 A Yes.

5 Q Okay. Wonderful. I just didn't want to
6 embarrass myself and insult you.

7 Now, I understand your testimony to be
8 in this proceeding that Level 3 receives zero
9 compensation for the traffic that Neutral Tandem
10 delivers to it for termination on Level 3's network.

11 Is that a fair characterization of
12 your testimony?

13 A Yes.

14 Q Now, you're the president of wholesale --
15 or vice president of wholesale markets.

16 So it would be fair if we credited you
17 with a fair understanding of intercarrier
18 compensation generally, wouldn't we?

19 A It depends on the specifics, but I'm aware
20 of -- I'm generally aware ever how intercarrier
21 compensation frameworks are -- how they work.

22 Q That's a fair answer.

1 Now, I heard you use in a colloquy
2 with Judge Brodsky a minute ago the term "bill and
3 keep."

4 A Mm-hmm.

5 Q Now, that is an arrangement whereby two
6 carriers that originate traffic for a termination on
7 each other's networks just don't bill each other for
8 reciprocal compensation, correct?

9 A Correct. When they're directly connected
10 together, that's typically one arrangement that can
11 happen.

12 Q And it can happen when they're indirectly
13 connected as well, correct?

14 A I suppose it can, but Level 3 has not -- we
15 don't find that CLECs in commercial -- in the
16 commercial world typically negotiate any kind of
17 piece of paper, any agreement for how to deal with
18 traffic where there's an intermediary in the middle.

19 Q Okay. Fair enough.

20 But notwithstanding the niceties of
21 it, bill and keep arrangements aren't un- -- well,
22 I'll retrack that.

1 Bill and keep arrangements are not
2 uncommon in the industry, correct?

3 A For telecom services?

4 Q Sure.

5 A I don't think that Level 3 has very many
6 bill and keep. I'm not aware of any bill and keep
7 relationships we actually have.

8 Q And by bill and keep --

9 A For telecom.

10 Q I'm sorry. And forgive me for interrupting
11 you.

12 By bill and keep relationships here,
13 you mean a direct somewhat formal agreement to
14 exchange traffic on a bill and keep basis.

15 Is that what mean by that testimony?

16 A Yes.

17 Q Okay. As matters currently stand, Neutral
18 Tandem delivers traffic that's originated by one or
19 more CLECs for Level 3 to terminate on its own
20 network, correct?

21 A Could you say that one more time.

22 Q Forgive me.

1 The relationship -- well, here, I'll
2 strike that.

3 Neutral Tandem delivers a certain
4 amount of traffic that's originated by CLECs to
5 Level 3, correct?

6 A Yes.

7 Q And Level 3 transports or terminates or
8 both that traffic on its own network or that of its
9 affiliates, correct?

10 A Yes.

11 Q And we can agree that as a matter of -- and
12 I'm begging an objection here, but as a purely legal
13 matter, Level 3 is entitled to receive reciprocal
14 compensation for -- from those CLECs when it
15 terminates their traffic on its network?

16 Is that consistent with your
17 understanding?

18 MR. GOCKLEY: You're asking for her lay
19 opinion?

20 MR. HARVEY: I am indeed asking for her
21 understanding as a person who is not a lawyer, but
22 was nonetheless well-versed -- or somewhat versed in

1 intercarrier compensation issues.

2 THE WITNESS: My understanding is that there's
3 a framework in place, for lack of a better, more
4 legal term to describe it, that provides for
5 reciprocal compensation to be exchanged from the
6 originating carrier to the terminating carrier; but
7 that's not -- that's not what this case is about to
8 me.

9 I mean, because we -- whether or not
10 we're connect- -- whether or not a minute comes to
11 Level 3's network from Verizon -- or from AT&T in
12 this state, I guess, or from Neutral Tandem, if we're
13 not earning reciprocal compensation on that minute in
14 either of those scenarios, the issue that Level 3 has
15 with the arrangement that we have with Neutral Tandem
16 is that we are being asked to do extra work to
17 interconnect Neutral Tandem directly when our
18 obligation is to interconnect with them directly or
19 indirectly. And we want compensation for that; but I
20 don't think that that's the same thing as reciprocal
21 compensation, that the originating carrier may have
22 the obligation to pay under this intercarrier

1 compensation legal framework --

2 BY MR. HARVEY:

3 Q Okay.

4 A -- that's out there.

5 Q Now, let me ask you the exact opposite

6 question.

7 When you -- and by "you" I don't mean

8 you, Ms. Baack, I mean you, Level 3 -- deliver

9 traffic to Neutral Tandem for termination

10 on somebody -- the network of somebody who's -- or

11 some carrier who's interconnected with them, you

12 would -- you, Level 3, would, in fact, owe reciprocal

13 compensation under those circumstances, correct?

14 A Owe reciprocal compensation to --

15 Q To the terminating carrier that's

16 interconnected with Neutral Tandem.

17 A I mean, nobody's ever pursued that from us.

18 Q So you don't pay them --

19 A No.

20 Q -- that reciprocal compensation is what

21 you're saying?

22 A No.

1 Q Okay. And you do not affirmatively seek it
2 from them?

3 A We seek -- we seek that kind of
4 compensation arrangement when we seek a direct
5 contract with another -- a commercial traffic
6 exchange agreement with another CLEC, which is
7 typically when we direct connect with them.

8 So I think it's fair to say that
9 generally when -- when traffic is coming to us over a
10 transit connection, we don't -- we don't proactively
11 seek compensation unless we decide that we want to
12 commercially pursue a traffic exchange agreement to
13 direct connect.

14 Q And, in fact, you don't proactively pay
15 compensation either; is that correct?

16 A Not if someone doesn't bill us for it.

17 Q Fair enough.

18 MR. HARVEY: That is all I have for you. And I
19 thank you for your patience with me, Ms. Baack.

20 JUDGE BRODSKY: Okay. Thank you.

21 Is there any redirect?

22 MR. KELLY: Yes, your Honor. Could we take a

1 little break, though?

2 JUDGE BRODSKY: Certainly. If you want to --

3 MR. KELLY: 15 minutes? I'm sorry.

4 JUDGE BRODSKY: Oh, okay. All right. Well,
5 that's fine.

6 (Whereupon, a recess was taken.)

7 JUDGE BRODSKY: We're back on the record.

8 And is there any redirect for
9 Ms. Baack?

10 MR. GOCKLEY: Yes, there is, your Honor.

11 JUDGE BRODSKY: Okay. Please proceed.

12 MR. GOCKLEY: A minimal amount, you'll be happy
13 to here.

14 REDIRECT EXAMINATION

15 BY

16 MR. GOCKLEY:

17 Q Ms. Baack, right before the break in
18 response to questions from Mr. Harvey, you were
19 talking about -- he was asking you about bill
20 arrangements.

21 A Mm-hmm.

22 Q Can you describe to us under what

1 commercial circumstances Level 3 typically would
2 analyze whether or not a bill and keep arrangement is
3 appropriate?

4 A Yes. So the bill and keep arrangements are
5 things that I think we would entertain entering into
6 on a commercial basis when the companies are
7 exchanging traffic between one another, that traffic
8 is in relative balance, and, you know, for commercial
9 reasons, we both agree that it would make sense to
10 not have to pay each other back and forth because the
11 traffic is in balance.

12 And the difference -- I just want to
13 draw a distinction between that sort of arrangement
14 and the situation that we have with Neutral Tandem
15 where what we're talking about is a one-way only
16 traffic exchange, not a two-way traffic exchange.
17 And we have -- if you were to consider a commercial
18 agreement where -- where a bill and keep would be
19 applicable, from my business perspective, that would
20 mean the traffic would need to be in balance.

21 The traffic that we have between our
22 two parties is way out of balance. We send Neutral

1 Tandem very de minmis amount of traffic and they sent
2 Level 3 a number, you know, on the order 350 to 400
3 million minutes a month.

4 And that arrangement, I think, does
5 not warrant -- that would not warrant, from our
6 perspective, a bill and keep arrangement
7 commercially, which is why we're having this dispute.

8 Q I believe you also said in response to
9 Mr. Harvey's questions Level 3 has no bill and keep
10 agreements currently?

11 A Yes. And I made a mistake there. I want
12 to just reclarify that we do have some bill and keep
13 traffic exchange agreements in place.

14 Q Ms. Baack, in response to questioning from
15 Mr. Harrington concerning Data Requests Response
16 JZ 1.04. I'm going to show that to you now so you
17 can refresh your recollection.

18 Do you see the company response there?
19 It concerns wireless agreements?

20 A Yes. Yes.

21 Q Can you tell us what percentage of the
22 transited traffic that Level 3 receives from those

1 companies from which they receive compensation?

2 A Yes, in aggregate Level 3, five percent of
3 the traffic that is transited to our network is --
4 is -- we earn recip comp for five percent of the
5 traffic that transits to our network. That's the
6 amount of traffic represented by these four
7 agreements we inherited from Broadway.

8 Q So to flip that around then, 95 percent of
9 the transit traffic that Level 3 receives, Level 3
10 currently receives no compensation?

11 A Correct.

12 Q Ms. Baack, in response to questioning from
13 Mr. Harrington, he asked you to review Level 3's
14 answer to Paragraph 16 in their complaint.

15 Do you recall that questioning?

16 A Yes, where he's talking about where Neutral
17 Tandem makes a statement about being telecom
18 industries only independent provider of tandem
19 transit and Level 3 agreed to that statement.

20 Q You've been asked to compare Level 3's
21 response in its answer to your testimony at
22 Page 7 beginning at Line 12.

1 Do you recall that?

2 A Yes.

3 Q And I think the question inferred that
4 there's an inconsistency in Level 3's answer to the
5 complaint and your testimony?

6 A Yes. And I don't agree that there's an
7 inconsistency. But what I was trying to explain in
8 my testimony is that Neutral Tandem is not the only
9 provider of tandem transit services in the state of
10 Illinois, but that's not the same thing as saying
11 that -- that's not inconsistent with the statement
12 that says Neutral Tandem is the only -- I'm sorry --
13 that -- hold on one second. I'm sorry.

14 That's not the same thing as saying
15 Neutral Tandem -- that's not inconsistent with saying
16 Neutral Tandem is the industries only independent
17 provider of tandem transit services.

18 In -- my definition of being an
19 independent provider means that's the sole business
20 model that Neutral Tandem has, the sole service that
21 they sell is tandem transit service. And on that
22 definition of independent, I'm not aware of another

1 provider that provides only that service, but I am
2 aware of providers that provide that service and
3 other services -- other telecom services as well. So
4 that was -- I wanted to make that clarification.

5 MR. GOCKLEY: Thank you. Could I have just one
6 moment, your Honor.

7 JUDGE BRODSKY: You may.

8 BY MR. GOCKLEY:

9 Q Ms. Baack, Mr. Harrington asked you a
10 series of questions about a press release that
11 Level 3 made in response to the Cogent situation.

12 Do you recall that?

13 A Yes.

14 Q And are you familiar with that press
15 release?

16 MR. HARRINGTON: Objection. Your Honor, I
17 didn't actually ask her any questions about any press
18 release, but...

19 JUDGE BRODSKY: I think the door's been opened.

20 MR. HARRINGTON: That's fine.

21 THE WITNESS: I'm familiar with -- I'm familiar
22 that there were a couple of press releases on the

1 matter. I'd have to review the specifics.

2 BY MR. GOCKLEY:

3 Q I'm going to show you what I'll have marked
4 as Level 3 Exhibit 1.2.

5 MR. KELLY: 16.

6 MR. GOCKLEY: I'm sorry, Hank, what was that?

7 MR. KELLY: Exhibit 16.

8 (Whereupon, Level 3 Exhibit
9 No. 16 was marked for
10 identification, as of this
11 date.)

12 MR. GOCKLEY: I'm sorry.

13 BY MR. GOCKLEY:

14 Q Exhibit 16 purports to be a press release
15 dated October 7th, 2005?

16 A Yes.

17 Q Would you please review this.

18 A Okay. I've reviewed it.

19 Q Does that press release provide further
20 clarification of the facts and circumstances behind
21 the dispute that Level 3 had with Cogent?

22 A Yes, it does.

1 MR. GOCKLEY: Your Honor, at this time I would
2 move for admission of Level 3 Exhibit 16.

3 MR. HARRINGTON: Your Honor, we do object.
4 This is hearsay. She's testified she doesn't have
5 personal knowledge. This is an Internet printout.
6 It's hearsay.

7 JUDGE BRODSKY: Do you want to respond?

8 MR. GOCKLEY: This is supposed to be a business
9 record, your Honor.

10 MR. HARRINGTON: It's an Internet printout.

11 MR. GOCKLEY: I don't know if the Internet has
12 any impact on that one way or another.

13 MR. HARRINGTON: There's been no foundation
14 laid for this. This is really hearsay upon hearsay
15 in many ways. I mean, this is a printout from the
16 Internet of what purports to be a press release from
17 Level 3.

18 I mean, there's been no foundation
19 laid regarding this document whatsoever. She hasn't
20 testified that she participated in the drafting of
21 this. There's just no foundation.

22 MR. KELLY: She did lay the foundation. She

1 indicated that she was aware of the press release,
2 that that was the press release that she had
3 discussed earlier in her testimony. And it does
4 describe the dispute or relationship between Cogent
5 and Level 3. So there was foundation laid for it.

6 MR. HARRINGTON: That is not an adequate
7 foundation as a matter of law, your Honor. To simply
8 say that she heard of a press release does not
9 provide foundation for the admission of this.

10 MR. KELLY: No, she identified the press
11 release as the one she had -- the one she was
12 thinking of.

13 MR. HARRINGTON: Right. Which she didn't --

14 MR. BASIL: For which, your Honor, during her
15 testimony she testified she had no personal knowledge
16 of the incident. So now they're trying to bootstrap
17 the press release that she had not personal knowledge
18 of to say, That must be the press release to try and
19 lay the foundation. They haven't laid the foundation
20 for this press release.

21 JUDGE BRODSKY: Ms. Baack, is this the -- is
22 this the press release that you were attempting to

1 discuss previously?

2 THE WITNESS: Yes.

3 JUDGE BRODSKY: All right. For purposes of
4 right now, I'm going to overrule the objections and
5 allow the document. I have no doubt that if you
6 choose, you can further explore the issue on recross.

7 (Whereupon, Level 3 Exhibit
8 No. 16 was admitted into
9 evidence.)

10 MR. GOCKLEY: With that, we have no further
11 questions.

12 JUDGE BRODSKY: Recross?

13 MR. HARVEY: Nothing from Staff, your Honor.

14 MR. HARRINGTON: Just a --

15 JUDGE BRODSKY: Do you want a few minutes?

16 MR. HARRINGTON: No, actually, just one quick
17 one.

18 RECROSS-EXAMINATION

19 BY

20 MR. HARRINGTON:

21 Q Ms. Baack, in response to the redirect
22 question of Mr. Gockley, you testified that Level 3

1 receives compensation under certain contracts for
2 about five percent of transited traffic?

3 A Yes.

4 Q Isn't it true, though, that even if Level 3
5 received compensation for a hundred percent of the
6 transited traffic, it would still seek additional
7 payments from Neutral Tandem?

8 JUDGE BRODSKY: You know what, hold on just a
9 minute. Could you put it in the microphone. I can't
10 hear with the fire department outside.

11 MR. HARRINGTON: Is that -- is that better?

12 JUDGE BRODSKY: Yes. Thank you.

13 BY MR. HARRINGTON:

14 Q Isn't it true that even if Level 3 received
15 compensation for 100 percent of the transited traffic
16 it receives from originating carriers that it would
17 still seek additional payments from Neutral Tandem?

18 MR. GOCKLEY: Objection. Calls for
19 speculation.

20 JUDGE BRODSKY: Overruled.

21 THE WITNESS: Certainly I think that from a
22 commercial business perspective, what we would pursue

1 might be influenced by the fact that we receive
2 reciprocal compensation in this scenario from -- for
3 a hundred percent of the traffic; but the fact is,
4 we're still providing an incremental service that
5 we're not obligated to provide to Neutral Tandem.

6 And so looking to receive some
7 compensation for that incremental service is
8 appropriate, in my view.

9 BY MR. HARRINGTON:

10 Q So the answer to my question was, Yes, you
11 would still seek -- Level 3 still would seek
12 additional compensation from Neutral Tandem even if
13 it received reciprocal compensation for 100 percent
14 of its traffic?

15 A That's a scenario, that's not in reality.
16 So I can't say for sure that that's what we would do;
17 but I'm saying I think there's a basis for us doing
18 so, yeah.

19 Q But you would seek to negotiate that?

20 MR. KELLY: Objection. Asked and answered.

21 THE WITNESS: I don't know.

22 JUDGE BRODSKY: Wait. Sustained.

1

2 BY MR. HARRINGTON:

3 Q Okay. Ms. Baack, do you have the

4 Connecticut transcript that I provided you with

5 earlier?

6 A Yes.

7 Q Let me direct your attention --

8 MR. HARRINGTON: Matt, do you have that?

9 MR. HARVEY: I do, indeed. I could probably

10 live without this.

11 MR. HARRINGTON: No, you can have it.

12 Your Honor, do you still have a copy?

13 JUDGE BRODSKY: Yes.

14 BY MR. HARRINGTON:

15 Q Let me direct your attention to Page 45.

16 A Yes.

17 Q Do you see the beginning on Line 23 of the

18 proceedings in Connecticut I asked you the following

19 question, So even if Level 3 were receiving

20 reciprocal compensation payments for every minute

21 Neutral Tandem sends to Level 3 from the originating

22 carriers already, Level 3 would demand additional

1 payments from Neutral Tandem?

2 And then on Page 46 you respond, We
3 would seek to negotiate that.

4 Do you see that?

5 A Yes.

6 MR. HARRINGTON: Okay. No further questions.
7 Thank you.

8 JUDGE BRODSKY: Anything further?

9 MR. KELLY: One question on redirect.

10 Can I just do it, your Honor?

11 REDIRECT EXAMINATION

12 BY

13 MR. KELLY:

14 Q Ms. Baack, turning your attention to -- on
15 Page 46, the same reference.

16 A Of this Connecticut --

17 Q The Connecticut transcript, right.

18 A Mm-hmm.

19 Q And following that question -- or that
20 answer, can you read what the follow-up question was
21 and what your answer was.

22 So Mr. Harrington then asked you

1 also -- go ahead.

2 A And would those payments be then based
3 solely on that claim incremental cost that Neutral
4 Tandem -- well, oops -- Level 3 incurs, or would it
5 be whatever Level 3 -- and then I guess I interrupt
6 him. Then I said, I think it would -- I think it
7 would probably be -- I'd have to think about that.
8 If we were receiving compensation from all -- from
9 all of the -- from 100 percent of the originating --
10 if we were receiving a hundred percent compensation
11 on the originating traffic -- sorry. I'm not saying
12 that well.

13 If we were receiving compensation from
14 the originating carrier for 100 percent of that
15 traffic, certainly that would change our economic
16 proposition. It would probably adjust the level of
17 compensation that we're seeking from Neutral Tandem
18 as a practical commercial matter, not as a regulatory
19 matter.

20 MR. KELLY: All right. Thank you.

21 JUDGE BRODSKY: Anything further?

22 MR. HARRINGTON: Other than to know that I'm

1 shocked that either Ms. Baack or I ever would've
2 interrupted each other during the course of
3 examinations, nothing further.

4 JUDGE BRODSKY: Anything from Staff?

5 MR. HARVEY: Nothing, your Honor.

6 JUDGE BRODSKY: All right. Thank you,
7 Ms. Baack.

8 THE WITNESS: Thank you.

9 MR. HARRINGTON: Thank you, Ms. Baack.

10 MR. GOCKLEY: Your Honor, I earlier moved for
11 admission of Exhibits 1 and 1.1 and 16.

12 JUDGE BRODSKY: 1 and 1.1 were admitted
13 previously as was 16.

14 MR. KELLY: 16 was admitted as well, I believe.

15 JUDGE BRODSKY: Yeah, in the event that 1 and
16 1.1 and 16 were not --

17 MR. HARRINGTON: We reiterate our objection to
18 16, your Honor.

19 JUDGE BRODSKY: Okay. And -- so I think all
20 three of them were fully discussed and admitted; but
21 just in the event that they weren't, then they were
22 admitted.

1 I do remember hearing about the
2 objections and discussing those. So I'm sure that
3 they already have been.

4 And let's see, it's 11:30.

5 MR. HARRINGTON: Your Honor -- I'm sorry -- I
6 believe my cross of Mr. Gates will be done before
7 noon.

8 JUDGE BRODSKY: Okay.

9 MR. HARVEY: And I have a very small number of
10 questions for Mr. Gates, which can be readily
11 accomplished in five minutes or less.

12 JUDGE BRODSKY: Okay. And then we have
13 Mr. Hoagg as well.

14 So what's the parties' estimates for
15 Mr. Hoagg?

16 MR. HARRINGTON: I won't be asking Mr. Hoagg
17 any questions.

18 MR. KELLY: I would expect about 20 minutes,
19 your Honor.

20 JUDGE BRODSKY: Well, then what is the parties'
21 preference.

22 MR. HARRINGTON: Our personal preference would

1 be to try to push through and even finish before
2 lunch, if possible.

3 MR. HARVEY: That's fine with Staff, your
4 Honor. I understand some of the parties have to get
5 to Tallahassee for God only knows what reasons.

6 JUDGE BRODSKY: Well, then, in that case, let's
7 see what we can do.

8 MR. GOCKLEY: Five minutes to get set up?

9 MR. HARRINGTON: Oh, your Honor, before we go
10 off the record, we would also move admission of
11 Neutral Tandem 6 and 7.

12 JUDGE BRODSKY: You know, let's just --

13 MR. HARRINGTON: Should we do that after.

14 JUDGE BRODSKY: -- let's do it when we get
15 back.

16 (Whereupon, a recess was taken.)

17 JUDGE BRODSKY: Let's go back on the record.

18 And you may call your next witness.

19 MR. HARRINGTON: Actually, your Honor, we were
20 going to move 6 and 7.

21 JUDGE BRODSKY: You were going to move.

22 MR. HARRINGTON: So we would move Neutral

1 Tandem 6, which is a -- the discovery responses from
2 Level 3, and Neutral Tandem 7, which is the answer of
3 Level 3. We would move for their admission on
4 direct.

5 MR. GOCKLEY: Your Honor, if I recall,
6 Mr. Harrington used two of the Staff data requests
7 responses in questioning -- in questions directed to
8 Ms. Baack. And we would have no objection to the
9 admission of those two, but I don't see why we would
10 throw all the answers in at this juncture.

11 JUDGE BRODSKY: Okay.

12 MR. HARRINGTON: Well, apparently -- Mr. Basil
13 has informed me they're apparently already attached
14 to the testimony of our witnesses. This has already
15 been admitted. So, I guess we --

16 MR. BASIL: Oh, I'm sorry. I'm sorry. This is
17 New York stuff. We're talking about Illinois here.

18 MR. HARRINGTON: I apologize. I did not hear
19 Mr. Gockley's statement because my co-counsel and I
20 were conferring.

21 What was the issue raised?

22 MR. GOCKLEY: I believe that you used two of

1 Staff's data request responses in crossing Ms. Baack.
2 We would have no objection to their admission, but we
3 would oppose the admission of the other data request
4 responses.

5 MR. HARRINGTON: And I'm not sure on what basis
6 the opposition would be? They're admissions --
7 they're admissions in this proceeding. They're sworn
8 responses.

9 MR. KELLY: It's direct evidence on their part
10 then. They've got to introduce cross-examination
11 questions. If they don't ask the witness
12 cross-examination, then it's not impeachment. It's
13 not -- it serves no purpose.

14 By introducing it at this -- they can
15 certainly do that, you know, in their direct case,
16 but not on cross-examination.

17 MR. HARRINGTON: Well, Judge, I mean, I don't
18 want to have -- let me see what we --

19 JUDGE BRODSKY: Why don't you take a moment to
20 consider what portion of this you move for.

21 MR. HARRINGTON: I think I did actually ask
22 Ms. Baack if she was responsible for verifying or was

1 the responsible party for all of their answers and
2 she confirmed that she was. So I think I did ask her
3 about all of the Staff discovery responses.

4 And, obviously, we also asked her
5 about Exhibit 1 as well. So, I mean...

6 JUDGE BRODSKY: Well, if there's not something
7 related, then we're not going to just wholesale take
8 evidence that's not related to anything in the
9 proceeding.

10 MR. HARRINGTON: And that's fine, your Honor.
11 I don't know if it's that controversial. I believe I
12 asked her about 1.0- --

13 MR. KELLY: It's 1.02.

14 MR. HARRINGTON: -- 1.02, 1.03, 1.- --

15 MR. KELLY: 1.04 A.

16 MR. GOCKLEY: That's all I have.

17 MR. HARRINGTON: -- 1.04 A and then Exhibit 1.

18 And that's fine, your Honor, we can
19 limit it that way.

20 JUDGE BRODSKY: What was --

21 MR. KELLY: And also I believe -- yes,
22 Exhibit 1.

1 JUDGE BRODSKY: What was the Exhibit --

2 MR. HARRINGTON: Exhibit 1 is the subsidiary to

3 those.

4 MR. KELLY: And also the attachment, the

5 January 18th, 2007 agreement, which is attached as

6 10- -- 1.04 A, that's Exhibit 2.

7 MR. HARRINGTON: I didn't ask Ms. Baack about

8 that. And that's actually the agreement that we had

9 the objection to yesterday.

10 MR. KELLY: But --

11 JUDGE BRODSKY: That's very interesting. So

12 you've moved into evidence an exhibit that you have

13 an objection to.

14 MR. HARRINGTON: No, actually we haven't, your

15 Honor.

16 MR. KELLY: Well, they are moving -- I mean, if

17 they want -- they're moving for admission and we have

18 no objection over the admission of the complete

19 answer to 1.04 A.

20 JUDGE BRODSKY: And the contract referred to as

21 Exhibit 2 is -- is it not the very item that you had

22 an objection to yesterday?

1 MR. HARRINGTON: But I didn't ask her any
2 questions -- there's two parts to 1.04 A. I asked
3 her about the textual response in Paragraph 1. The
4 reference to the agreement is in another paragraph
5 that I did not ask her about and, in fact, isn't
6 responsive to the requests in any event, but I didn't
7 ask her about that one.

8 JUDGE BRODSKY: Well, as we've gone over before
9 with these, when moving into discovery response pages
10 into evidence, it's all or nothing for what's on the
11 page.

12 So, again, I guess what the question
13 boils down to is, with respect to new Neutral Tandem
14 Exhibit 6, are you -- you know, what are you moving
15 for --

16 MR. HARRINGTON: We will --

17 JUDGE BRODSKY: -- admission?

18 MR. HARRINGTON: We'll move and that's fine,
19 including the agreement.

20 JUDGE BRODSKY: Okay.

21 MR. HARRINGTON: If that's your Honor's ruling,
22 I understand.

1 JUDGE BRODSKY: All right. So that being the
2 case -- well, so in substance, there's very little,
3 right, that has not been -- has not been discussed
4 out of that packet.

5 Now, correct me if I'm wrong, what has
6 not been discussed is JZ 1.01, all subparts, JZ
7 1.04 B, as in ball, C, as in Charlie, D, as in delta,
8 and JZ 1.05; is that correct?

9 MR. HARRINGTON: I'm sorry. What were the
10 subparts? 1.04...?

11 JUDGE BRODSKY: Bravo, Charlie, delta and echo.
12 Sorry. Bravo, Charlie, delta and 1.05.

13 MR. KELLY: Yes, that's my understanding.

14 So to be admitted we have no objection
15 over --

16 MR. HARRINGTON: That's fine.

17 MR. KELLY: -- his 1.02, 1.03, and 1.04 A. And
18 then Exhibits 1 and 2.

19 JUDGE BRODSKY: Correct.

20 Okay. So Neutral Tandem Exhibit 6 is
21 admitted in part, JZ 1.02, 1.03, 1.04 A, Exhibit 1
22 and Exhibit 2.

1 So hopefully this clarifies rather
2 than confuses the issue, but the page numbers at the
3 bottom for 1.02, 1.03 and 1.04 A are Page Nos. 8, 9
4 and 10. Exhibit 1 has no page number specifically,
5 nor does Exhibit 2, which is the contract. And
6 that's the item that begins with a cover letter from
7 Ludaway, L-u-d-a-w-a-y. All right.

8 (Whereupon, Neutral Tandem
9 Exhibit Nos. 1, 2 and 6 were
10 admitted into evidence.)

11 JUDGE BRODSKY: Now, just for record-keeping
12 purposes, the outstanding exhibit from Level 3 --

13 I believe it was Exhibit 11?

14 MR. KELLY: Yes, your Honor.

15 JUDGE BRODSKY: -- is also, therefore,
16 admitted. The outstanding objection is overruled
17 since this is the same item as 1.04 A, Exhibit 2.

18 (Whereupon, Neutral Tandem
19 Exhibit No. 11 was admitted
20 into evidence.)

21 JUDGE BRODSKY: And then we had Neutral Tandem
22 Exhibit 7.

1 MR. KELLY: No objection.

2 JUDGE BRODSKY: Well --

3 MR. HARVEY: The answer to the complaint, I
4 think, is a matter of record. I'm not sure --

5 JUDGE BRODSKY: Exactly.

6 MR. HARRINGTON: I understand. So we will
7 withdraw that request.

8 JUDGE BRODSKY: Okay. Okay. And then -- and
9 then one more time for the record, Level 3 Exhibit 11
10 is -- as far as I understand, exactly the same
11 document as Neutral Tandem Exhibit 6. And then
12 within that, Exhibit 2 referred to on Page 10. All
13 right.

14 Okay. So that wraps up the exhibit
15 issues. And if you're ready, you can call your next
16 witness.

17 MR. GOCKLEY: Thank you, your Honor. We have
18 one more witness to be sworn.

19

20

21

22

1 (Witness sworn.)

2 TIMOTHY J. GATES,

3 called as a witness herein, having been first duly
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY

7 MR. GOCKLEY:

8 Q Would you please state your name for the
9 record.

10 A My name is Timothy J. Gates.

11 Q Mr. Gates, you have in front of you an
12 document that labeled Exhibit 2, Pretrial direct
13 testimony of Timothy J. Gates on behalf of Level 3
14 Communications, LLC?

15 A Yes, I do.

16 Q Does that document contain your direct
17 testimony in this matter?

18 A Yes.

19 Q Yesterday at the outset of these
20 proceedings, you brought to our attention an omission
21 in your testimony.

22 Do you recall that?

1 A Yes. On Page 54 of my direct, Line 8.
2 After the word "a" and before the period insert the
3 word "regime."

4 So that line would read, Resolve
5 disputes over the terms and conditions for such a
6 regime.

7 Q And the copies of the testimony that have
8 been distributed today contain that change in print,
9 do they not?

10 A I believe they do.

11 MR. GOCKLEY: Your Honor, if I may, as a matter
12 of housekeeping, yesterday you asked when a witness
13 is proffered who was using graphs and charts that you
14 wanted an explanation of those graphs and charts.

15 Would that be an appropriate time to
16 do that now?

17 JUDGE BRODSKY: Yes, that's fine.

18 BY MR. GOCKLEY:

19 Q Mr. Grates, in your direct testimony do you
20 use any charts or graphs?

21 A Yes, I do beginning at Page 10.

22 Q Can you describe that for us.

1 A Yes. Could I approach the diagrams, or
2 would you like me just to discuss --

3 JUDGE BRODSKY: Sure. That's fine.

4 THE WITNESS: Thank you.

5 JUDGE BRODSKY: And, actually, I can only see
6 about half of that, so move that to the front.

7 THE WITNESS: I'll move that down. Everybody
8 else has copies.

9 JUDGE BRODSKY: Okay. Great.

10 THE WITNESS: Your Honor, this is the first
11 diagram in my testimony at Page 10 and it shows that
12 simple form of indirect interconnection. This is by
13 far the most common type of interconnection that we
14 have in the industry today.

15 Over here we have CLEC One. It could
16 be Comcast, it could be XO, it could be anybody.
17 Here we have the AT&T tandem and here we have another
18 CLEC. It could be, again, Comcast or Level 3. And
19 we have trunks right in between CLEC One and AT&T.

20 This is a direct interconnection
21 between CLEC One and AT&T, also a direct
22 interconnection between AT&T and CLEC Two. So -- but

1 because CLEC One and Two do not have direct
2 interconnection, traffic from a consumer or a
3 customer of CLEC One that's going to a customer of
4 CLEC Two has to go through the tandem. And that's
5 what's called transiting.

6 Going to the diagram on Page 11, which
7 shows direct interconnection between two CLECs. Your
8 Honor, really the only difference between these two
9 is you can see now we have a line between CLEC One
10 and CLEC Two.

11 And for your information, in these
12 lines sometimes they're called circuits, sometimes
13 they're called trunks. They can be copper. They can
14 be glass, fiber optic cable. They're called trunks
15 when they're between machines. They're called
16 circuits when they go from a machine -- a switching
17 machine to a consumer, but it's really the same
18 thing.

19 And the technology, the copper versus
20 fiber optic cable, you know, might affect the
21 equipment on each end, but it still carries the
22 traffic.

1 JUDGE BRODSKY: Okay.

2 THE WITNESS: Okay. So here you see CLEC One
3 and CLEC Two now have decided amongst themselves that
4 there's enough traffic between the two entities to
5 justify a commercial arrangement and direct
6 interconnection between the two carriers.

7 So they negotiate an interconnection
8 or traffic exchange agreement. And they establish
9 this trunking facility between CLEC One and CLEC Two
10 so they do not now have to go through AT&T's tandem.

11 On Page 13 -- I don't think I have a
12 blowup of this one, your Honor, but if you'll look at
13 my testimony at Page 13, this interjects Neutral
14 Tandem into the process. We still have CLEC One on
15 the left, CLEC Two on the right and above is Neutral
16 Tandem. And you'll see we still have lines between
17 the CLEC One and the AT&T tandem that's because in
18 the industry, carriers have to maintain those trunks
19 because they still have a majority of their traffic
20 going to, for instance, AT&T customers. So they
21 retain direct interconnection with the AT&T tandem.

22 The dash lines is the interconnection

1 between CLEC One and Neutral Tandem and CLEC Two and
2 Neutral Tandem. In this case, CLEC One has decided
3 to route its traffic through Neutral Tandem to CLEC
4 Two.

5 On Page 14, I've simply changed CLEC
6 Two to Level 3 to make it pertinent to our case.

7 On Page 15, this is a picture of a
8 typical co-location between an ILEC and a CLEC. And
9 here I'm referring to the actual pictures.

10 Your Honor, this is not a
11 representation or a picture of the interconnection
12 between Level 3 and Neutral Tandem. I don't
13 represent it as such and Neutral Tandem has suggested
14 that it is, it is not.

15 MR. HARRINGTON: Your Honor --

16 THE WITNESS: It is just an example of the way
17 that CLECs co-locate --

18 JUDGE BRODSKY: Hold on.

19 MR. HARRINGTON: I do object. I mean, I
20 understand your very understandable desire to have a
21 chart and graph explained, but you also ruled that
22 the witnesses will not be providing summaries of

1 their testimony. And I do think Mr. Gates has
2 strayed into a summary of his testimony and
3 essentially an argument in response to testimony that
4 Neutral Tandem has provided.

5 I think it's fair for Mr. Gates to say
6 what this is. I respectfully do not believe it's
7 fair for him to give a summary of his view regarding
8 the importance of any of these particular charts to
9 this case. I didn't understand that to be what you
10 were looking for.

11 JUDGE BRODSKY: Fair enough. What I was --
12 what I was envisioning was a bit of an explanation by
13 means of testimony. So if there are questions aside
14 from -- tell us everything about the charts, then
15 that would be the appropriate way to do it.

16 MR. GOCKLEY: Okay. That's fine.

17 JUDGE BRODSKY: I think just moving forward to
18 where the --

19 THE WITNESS: Really at the last diagram, your
20 Honor --

21 JUDGE BRODSKY: So if there's a --

22 THE WITNESS: Page 18.

1 JUDGE BRODSKY: So if there's just a couple of
2 questions about it that you want to pose,
3 Mr. Gockley.

4 BY MR. GOCKLEY:

5 Q Mr. Gates, will you tell us what the
6 picture on Page 18 of your direct testimony depicts.

7 A Yes.

8 This picture shows Neutral Tandem at
9 the top with the 19 carrier customers of Neutral
10 Tandem represented in the box to the left
11 interconnected with Neutral Tandem, a dash line going
12 to Level 3. Notice that Neutral Tandem doesn't
13 originate traffic. So it has to enter into
14 agreements to get the originating traffic from its 19
15 carrier customers.

16 Neutral Tandem also doesn't terminate
17 traffic. So it has to enter into an agreement with,
18 in this case, Level 3 to terminate the traffic.
19 Neutral Tandem is simply the pivot point in the
20 middle to connect the traffic between the carriers.

21 The box at the bottom, your Honor,
22 shows that there are more than 50 other CLECs,

1 wireless providers, cable companies, et cetera, who
2 are not interconnected with Neutral Tandem. That
3 traffic continues to go through the AT&T tandem to
4 Level 3.

5 Now, if this line goes away, then the
6 traffic that used to go through Neutral Tandem will
7 continue to go through the AT&T tandem to Level 3 so
8 there would be absolutely no blockage. And that's
9 the intent of that diagram.

10 JUDGE BRODSKY: Okay. Thank you.

11 THE WITNESS: Thank you.

12 BY MR. GOCKLEY:

13 Q For clarification, if I were to ask you the
14 question that are set forth in this exhibit, here and
15 now would your answers be substantively the same?

16 A Yes, they would.

17 MR. GOCKLEY: Your Honor, at this time I would
18 move for admission of Level 3 Exhibit 2 and Mr. Gates
19 vitae, which is attached thereto as Exhibit 2.1.

20 I tender the witness for
21 cross-examination.

22 JUDGE BRODSKY: Is there any objection?

1 MR. HARVEY: None from Staff, your Honor.

2 MR. HARRINGTON: None from Neutral Tandem.

3 JUDGE BRODSKY: Okay. Then Exhibits 2 and 2.1

4 are admitted as marked.

5 (Whereupon, Level 3 Exhibit

6 Nos. 2 and 2.1 were admitted

7 into evidence.)

8 JUDGE BRODSKY: Are there cross-examination

9 questions?

10 MR. HARRINGTON: A limited amount.

11 MR. HARVEY: Please proceed, Counsel.

12 CROSS-EXAMINATION

13 BY

14 MR. HARRINGTON:

15 Q Good morning, Mr. Gates, by a minute or

16 two.

17 We have met before, correct? I'm John

18 Harrington, counsel for Neutral Tandem.

19 A Yes.

20 Q Mr. Gates, you are not an employee of

21 Level 3, are you?

22 A No.

1 Q Okay. You are -- you work for QSI
2 Consulting?

3 A That's correct.

4 Q And that is an outside consulting firm,
5 correct, that has been retained by you -- by Level 3
6 in this case?

7 A Yes.

8 Q Okay. And you began working for QSI in
9 approximately April 2000, I believe, according to
10 your --

11 A I'm not sure of the exact date. I may have
12 started working and doing projects with them before I
13 first filed a piece of testimony; but I think in
14 2000, 1999, something like that.

15 Q Okay. I can -- do you have your vitae in
16 front of you?

17 A I don't, no.

18 Q Oh, you don't?

19 A No. It's 30 pages and it's heavy.

20 Q Oh, is it attached test- -- do you have
21 your testimony with you?

22 A I do, but not my vitae.

1 Q You don't have your vitae attached --

2 A My counselor does.

3 Q Excellent.

4 Just to refresh your recollection, I

5 direct your attention to Page 2.

6 Do you see it says, Effective April

7 2- -- April 1, 2000 that you joined QSI Consulting?

8 A Yes, that's correct. I thought you asked

9 when I started working for Level 3.

10 Q Oh, no, I'm sorry.

11 A I misunderstood. I'm sorry.

12 Q I may have asked the wrong question. I

13 intended to ask you when you joined QSI Consulting.

14 A That's correct.

15 Q Okay. And you have been hired by Level 3

16 to give testimony in this case, haven't you?

17 A Yes.

18 Q Okay. And so you're being paid for your

19 testimony today?

20 A I am.

21 Q Okay. We'll come back to that in just a

22 second. And if you could keep your vitae with you, I

1 may ask you additional questions about that
2 throughout your testimony.

3 But first --

4 JUDGE BRODSKY: Mr. Harrington, a little
5 louder --

6 MR. HARRINGTON: Oh.

7 JUDGE BRODSKY: -- closer to the microphone,
8 perhaps.

9 BY MR. HARRINGTON:

10 Q Let me direct your attention to Page 2 of
11 your testimony, please.

12 You have a master's degree from
13 Willamette University, correct?

14 A Willamette University, yes.

15 Q I'm sorry. Wil-lom-et University?

16 A Wil-lam-et.

17 Q Willamette. I'm sorry.

18 A Johnny Carson had the same problem.

19 Q I see.

20 And that's in Oregon?

21 A Yes, it is.

22 Q Okay. You do not have a Ph.D., do you?

1 A No, I do not.

2 Q You don't have any other type of doctorate,
3 do you?

4 A Doctorate? No.

5 Q And you haven't completed the coursework
6 for a doctorate, have you?

7 A No.

8 Q You don't have an engineering degree, do
9 you?

10 A No, although I've been employed in the
11 engineering department of the Texas Public Utility
12 Commission. I am not a professional engineer.

13 Q Right. You've been employed in an
14 engineering department, but you are not an engineer,
15 correct?

16 A I would not consider myself a professional
17 engineer. I am hired to help with engineering issues
18 by various clients.

19 Q But you are not an engineer?

20 A I am not a professional engineer.

21 Q An amateur engineer, perhaps?

22 Let me direct your attention to Page 4

1 of your testimony, please.

2 Do you see beginning at approximately
3 Line 1 you indicate that part of your
4 responsibilities within QSI are to create cost
5 studies for incumbent carriers and competitive
6 carriers?

7 A Yes.

8 Q You haven't performed a cost study for
9 Level 3 in this case, have you?

10 A No --

11 Q Okay.

12 A -- none was required for this case.

13 Q Okay. Let me then go back to your work
14 here.

15 Are you charging Level 3 at an hourly
16 rate for testifying today?

17 A Yes, I am.

18 Q And what is that hourly rate?

19 A \$275.

20 Q And is that the same rate you charge for
21 the preparation of written testimony?

22 A Yes.

1 Q Level 3 has retained you in connection with
2 numerous disputes with Neutral Tandem, correct?

3 A Yes. I believe I've been retained to
4 testify in all of the cases. I don't know how many
5 complaints have been filed.

6 Q And, in fact, you've done quite a bit of
7 work for Level 3 since you came to QSI in April of
8 2000, haven't you?

9 A Quite a bit. It really represents less
10 than one percent of our total revenue. So for the
11 last two years --

12 Q That's interesting because it indicates
13 your -- if your vitae indicates that about 15 percent
14 of your testimony has been for Level 3 since you
15 joined QSI, would you accept that subject to check?

16 A I don't think that's correct.

17 Q You don't think that's correct. Okay.

18 A No, I don't.

19 Q Okay. I'm just going to ask you one very
20 quick question regarding your -- the last chart that
21 you had. Could I direct your attention to Page 18 of
22 your testimony.

1 A Yes, I'm there.

2 Q I was on Ms. Baack's testimony. I
3 apologize.

4 You have no basis to dispute
5 Mr. Saboo's testimony that of the 26 facilities-based
6 competitive carriers in Illinois and of the 22 that
7 are located in LATA served by Neutral
8 Tandem-Illinois, that Neutral Tandem is connected to
9 14 of those?

10 You have no basis to dispute that, do
11 you?

12 A You mentioned a LATA, which LATA?

13 Q The LATA served by Neutral Tandem.

14 A Not -- Neutral Tandem doesn't serve all the
15 LATAs in Illinois.

16 Q I'm sorry.

17 A Is that what you're saying?

18 Q No, I wasn't.

19 My question to you was, you reviewed
20 Mr. Saboo's testimony in preparing your testimony,
21 correct?

22 A I did. I just don't remember the 14

1 number.

2 Q Well, assuming that Mr. Saboo testified
3 that Neutral Tandem is connected to 14 of the 22
4 facilities-based competitive carriers in the LATA
5 served by Neutral Tandem, you have no personal
6 factual knowledge that would dispute that, would you?

7 MR. KELLY: Can I object. I just want to ask
8 for a clarification and it may be in Mr. Saboo's
9 testimony.

10 When he says "connected," I would like
11 to know whether he is referring to indirectly
12 connected or directly connected.

13 MR. HARRINGTON: That's not a legitimate
14 objection. The question's perfectly clear. I'm
15 asking this witness a question about testimony to
16 which he has responded.

17 That's just not -- I mean, Mr. Kelly
18 can try to articulate any concerns he has on
19 redirect, but that's just not a legitimate objection.
20 Mr. Saboo has testified that Neutral Tandem is
21 connected to 14 of the 22 -- directly connected --
22 actually that's probably a better -- let me withdraw

1 the question and strike that because Mr. Kelly's
2 objection is actually helpful.

3 So I'll withdraw the question.

4 JUDGE BRODSKY: Okay. So the question is
5 withdrawn.

6 MR. HARRINGTON: The question is withdrawn.

7 JUDGE BRODSKY: Start again.

8 BY MR. HARRINGTON:

9 Q Okay. Mr. Gates, you have no basis to
10 dispute that Neutral Tandem is directly connected to
11 14 of the 22 facilities-based competitive carriers in
12 the LATAs Neutral Tandem serves, do you?

13 A Well, I think we might disagree on -- I
14 think Mr. Kelly's clarification was helpful. When
15 you say "direct" -- I mean, I would agree that,
16 perhaps, Mr. Saboo testified to that, but I don't
17 know what he meant by "direct." If we're talking
18 about --

19 Q You know --

20 A If I may finish. If I may finish.

21 I don't know what he meant by that.
22 My number is on Page 18 and you're asking me about

1 was from the Commission's Web site.

2 Q Do you have any personal knowledge -- and I
3 will ask the question again, Mr. Gates. Respectfully
4 I don't think you already answered it.

5 Do you understand what direct
6 interconnection means?

7 A I certainly do, yes.

8 Q Okay. So if Mr. Saboo testified that
9 Neutral Tandem has direct interconnection with 14 of
10 the 22 facilities-based competitive carriers in the
11 LATAs Neutral Tandem serves in Illinois, you have no
12 personal knowledge that would allow you to dispute
13 that, do you?

14 A I can't dispute what Mr. Saboo testifies
15 to. My only concern would be definitions, which, you
16 know, we might have a disagreement. We certainly do
17 on other issues.

18 Q We don't have a disagreement, though, about
19 the definition of direct interconnection, do we?

20 A Well, I'm not sure. As Mr. Saboo
21 testified -- I will accept, subject to check, that
22 Neutral Tandem is connected -- directly connected as

1 testified by Mr. Saboo to the -- to those CLECs.

2 Q Thank you.

3 A I have no problem with that.

4 Q Thank you. And that really was all I was
5 asking. I wasn't asking anything other than that.

6 You also have no basis to dispute
7 Mr. Saboo's testimony that Neutral Tandem is
8 connected to the five largest wireless providers in
9 those LATAs, do you?

10 A I don't believe that Neutral Tandem is
11 connected to Verizon Wireless.

12 Q Do you claim --

13 A And -- I'm sorry -- my only point is, I
14 don't know how big they are relative to the others,
15 but I have no dispute with his claims that they are
16 connected to five wireless providers.

17 Q And do you claim to have personal knowledge
18 of whether Neutral Tandem is directly connected to
19 Verizon wireless in LATAs in Illinois?

20 Do you know that from your own
21 personal knowledge?

22 A No, I don't, although it would be unusual

1 to do it in one state and not others.

2 Q But you have no personal knowledge?

3 A I do not.

4 Q Okay. Thank you.

5 And so, again, you have no personal
6 basis to dispute Neutral Tandem's claim even assuming
7 that Verizon Wireless is one of the five largest
8 wireless providers, you have no basis to dispute that
9 Neutral Tandem is indirectly connected to the five
10 largest wireless providers in the LATAs that serves
11 Illinois, do you?

12 A No, I really don't see that as having any
13 impact on our problem here.

14 Q Well, I understand --

15 A I have no dispute.

16 Q You have -- and I understand that there's a
17 difference of opinion about that, but I have no
18 further questions regarding the facts of Mr. Gates.

19 MR. HARVEY: I'm sorry? No further questions
20 at all or...?

21 MR. HARRINGTON: Oh, facts or anything else.

22 MR. HARVEY: Okay.

1 CROSS-EXAMINATION

2 BY

3 MR. HARVEY:

4 Q Good afternoon, Mr. Gates.

5 A Good afternoon.

6 Q My name is Matt Harvey. I am the attorney
7 for the Staff of the Illinois Commerce Commission and
8 I have a couple of questions for you here this
9 afternoon.

10 We met, I believe, in the heady days
11 of Docket No. 04-0428. And, indeed, I may have some
12 questions regarding that for you.

13 Now, your testimony deals rather
14 substantially with the issue of indirect
15 interconnection and transit.

16 That would be fair to say, wouldn't
17 it?

18 A Yes.

19 Q And it is your view that anything that
20 Neutral Tandem does, AT&T Illinois -- that being the
21 incumbent LEC -- can also do in terms of transit and
22 indirect interconnection, correct?

1 A Not really. I mean, my testimony says that
2 they are similar offerings. I would not want to
3 suggest that Neutral Tandem's providing the same
4 diversity or redundancy or reliability that Neutral
5 Tandem does and vice versa. I'm not providing an
6 opinion on that.

7 They do both do provide a transit
8 functionality to carries.

9 Q And you -- your testimony is that AT&T
10 Illinois is ubiquitous throughout its service
11 territory, correct?

12 A Yes.

13 Q Now, you specifically state that AT&T has
14 historically provided transit services and,
15 therefore, indirect interconnection in the past
16 because of its unique market position.

17 Is that a fair recitation of your
18 testimony at Page 24?

19 A Yes.

20 At the bottom of the page there?

21 Q That's correct, sir.

22 A Yes, generally that's correct.

1 Q Now, AT&T Illinois does not do that -- let
2 me strike that.

3 AT&T does it under legal compul- -- I
4 will strike that again.

5 AT&T provides indirect interconnection
6 in transiting under legal compulsion as a result of
7 its, you know, unique market position; is that
8 correct?

9 A Well, without providing a legal conclusion,
10 I would say that, yes, in many states, most states,
11 the ILEC has been required to provide transit. Some
12 states they have just volunteered to do so.

13 So I don't know whether AT&T in
14 Illinois has volunteered or has been compelled to do
15 it, but there's good public policy for asking them to
16 provide transit traffic as they do today.

17 Q Fair enough.

18 Let us return, again, to the heady
19 days of Docket No. 04-0428, which, for the benefit of
20 the uninitiated, is the Level 3/AT&T Illinois
21 arbitration.

22 Is that correct, Mr. Gates?

1 A Yes, I --

2 Q And you, indeed, offered testimony in that
3 proceeding, did you not?

4 A I believe I did, yes.

5 Q And you will agree, subject to check, that
6 in that testimony you indicated that SBC was
7 attempting to withdraw transiting services and
8 indirect interconnection services from Level 3? Did
9 you not?

10 A I'm not certain. Could you show that me,
11 please.

12 Q I would be delighted to do that, provided
13 that I have leave to -- from the judge and counsel to
14 approach you. That being, I guess, an issue these
15 days.

16 A I'm not bothered by you looming over me.

17 Q I have been advised, Mr. Gates, that I'm
18 somewhat lurch-like in my bearing. And, therefore, I
19 will hand this to you at arm's length.

20 JUDGE BRODSKY: I need a second one.

21 MR. HARVEY: Oh, I'm sorry. I would kind of
22 like to give one to these guys, but I will get you

1 another one.

2 I have caused this to be marked as
3 Staff Exhibit No. 2 for identification.

4 (Whereupon, Staff Exhibit No. 2
5 was marked for identification,
6 as of this date.)

7 MR. HARVEY: And I will ask Mr. Gates to take a
8 quick look at Page 8 of this document wherein one of
9 those coincidences he discusses transiting.

10 BY MR. HARVEY:

11 Q And if you would note on Page -- or on
12 Line 8 -- Mr. Gates, are you there?

13 A Yes, I am.

14 MR. GOCKLEY: What page are you on?

15 MR. HARVEY: Page 8, Line 8.

16 BY MR. HARVEY:

17 Q You testified there that -- and I quote,
18 SBC has taken the position in this arbitration that
19 it is no longer required under the Act to transit
20 traffic from Level 3 to other carriers, did you not?

21 A Yes.

22 Q And you further testified that SB- -- and I

1 would refer you to the middle of Line 13 -- SBC is
2 seeking to advocate its responsibility to facilitate
3 the exchange of traffic between the carriers.

4 Did you not also so testify?

5 A Yes. Well said.

6 Q And I couldn't have said it better myself,
7 although I didn't.

8 Now, Mr. Gates, you would agree at
9 this point then that Illinois was, at the point you
10 submitted this testimony -- because you're a truthful
11 guy -- that SBC Illinois -- which is now AT&T,
12 correct?

13 A Yes.

14 Q So you'd agree that SBC Illinois was not at
15 that point offering transit and indirect
16 interconnection of its own free will, but rather
17 under some form of, if you will, compulsion or duress
18 either by the Commission or the FCC? Would that be
19 fair?

20 A Yes. I might not have used those words,
21 but clearly they didn't want to provide it and the
22 regulators decided that they should.

1 Q Fair enough.

2 And you don't have any reason to
3 believe at this point that AT&T has received your
4 wisdom and decided that they should, out of good
5 citizenship and a devotion to fair play in the
6 markets, provide transiting because -- even though
7 they might not have to; is that fair?

8 You don't know of any such thing?

9 A I can't testify to their thought process or
10 their intentions or why they're doing certain things.
11 All I know is that they have been required to provide
12 transit traffic. They're being fully compensated for
13 that traffic pursuant to towered rates approved by
14 this Commission. So they're certainly not harmed by
15 doing it. They may not want to do it, but they're
16 being fully compensated for that --

17 Q Fair enough.

18 A -- for that offering.

19 Q Now, as I understand it, the carriers that
20 directly interconnect with Neutral Tandem -- well,
21 I'll strike that.

22 You have no reason to believe that the

1 carriers that directly interconnect with Neutral
2 Tandem do so for any reason other than they want to,
3 correct?

4 A Again, I can't testify to why they do what
5 they do; but in any testimony, I mean, I suggest that
6 if they do have a relationship with Neutral Tandem,
7 that it must benefit them or they would cancel the
8 agreement or, like the other CLECs that are not
9 interconnected with Neutral Tandem, they simply
10 wouldn't engage in direct interconnection with
11 Neutral Tandem.

12 Q Thank you for that very comprehensive
13 answer, Mr. Gates.

14 And so, essentially -- I'm trying to
15 figure this out -- Level 3's corporate position here
16 is then that these CLECs should get transiting
17 services from AT&T, which they don't want to do and
18 it doesn't want to do, for Level 3's benefit?

19 Is that, I guess, a fair summary of
20 the position?

21 A No, that's absolutely wrong. This case is
22 all about interconnection rights. And recall that

1 Neutral Tandem is not an ILEC. You cannot compare
2 Neutral Tandem to AT&T.

3 CLECs do have a choice as to how they
4 route their traffic, but if a particular route is not
5 available, for instance, if there is no route from
6 CLEC One through Neutral Tandem to Level 3, obviously
7 they don't choose that route because it's not
8 available.

9 So if they want to get that traffic to
10 Level 3, they have to choose a route that is
11 available, which is their direct connection with
12 AT&T, an indirect interconnection with Level 3.

13 Q Fair enough, Mr. Gates.

14 Let me ask you this: Currently, as we
15 sit here today, there remains in place a direct
16 interconnection for both terminating and originating
17 traffic between Neutral Tandem and Level 3, correct?

18 And understanding that you're not an
19 engineer and you don't work for Level 3, but that
20 would be your understanding, correct?

21 A That was not my pause. My pause is that
22 those two arrangements, originating and terminating,

1 are governed under different agreements, but today --

2 Q How about the physical -- okay. And the
3 physical facilities are in place -- I guess I was not
4 very clever there.

5 The physical facilities are currently
6 in place to both -- for Level 3 to both receive
7 traffic from Neutral Tandem and to send traffic to
8 Neutral Tandem, correct?

9 A Yes. There is direct interconnection in
10 place today.

11 MR. HARVEY: Thank you very much, Mr. Gates. I
12 appreciate your time.

13 THE WITNESS: Thank you.

14 JUDGE BRODSKY: Thank you.

15 Is there further redirect?

16 MR. GOCKLEY: Yes, there is, your Honor. Could
17 we have five minutes?

18 JUDGE BRODSKY: Sure.

19 MR. HARRINGTON: Wait. Your Honor, the cross
20 was very limited and I don't really know that there's
21 any legitimate basis -- I mean, I don't mind if
22 counsel confer, but is it your Honor's expectation in

1 understanding that they will be conferring with
2 Mr. Gates regarding his redirect during this five
3 minutes?

4 JUDGE BRODSKY: Not particularly.

5 MR. HARRINGTON: Okay. Then thank you, your
6 Honor.

7 (Whereupon, a recess was taken.)

8 JUDGE BRODSKY: Are you all set?

9 MR. GOCKLEY: Thank you.

10 REDIRECT EXAMINATION

11 BY

12 MR. GOCKLEY:

13 Q Mr. Gates, in response to the questions
14 from Mr. Harvey, I want to ask you this question: In
15 the event that Neutral Tandem no longer has a direct
16 connection with Level 3, will not the other 18
17 customers of Neutral Tandem still be able to use
18 Neutral Tandem to transfer calls to and from them?

19 A Oh, absolutely, it just means that the
20 route to Level 3 is unavailable; but the remaining 18
21 routes or so, that traffic will continue to be
22 originated and terminated as it is today.

1 MR. GOCKLEY: No further questions.

2 JUDGE BRODSKY: Anything further?

3 MR. HARRINGTON: Not from Neutral Tandem.

4 MR. HARVEY: Nor from Staff, your Honor.

5 JUDGE BRODSKY: Thank you, Mr. Gates.

6 THE WITNESS: Thank you.

7 JUDGE BRODSKY: Is there anything further from

8 Level 3 at this point?

9 MR. GOCKLEY: I'm getting a little addle, but I

10 know I moved for admission of --

11 MR. HARVEY: I will go fetch Mr. Hoagg. He

12 seems to have left us very briefly.

13 MR. BASIL: Do you want us to move?

14 MR. HARVEY: I don't know. I mean, it's really

15 up to the judge and the court reporter. I can put

16 Mr. Hoagg here and I can sit here or whatever...

17 JUDGE BRODSKY: Whatever makes you feel

18 comfortable, Mr. Harvey.

19 MR. HARVEY: You know, I'm, at this point,

20 indifferent to comfort, your Honor.

21 JUDGE BRODSKY: Okay. Are you ready?

22 MR. HARVEY: We are, indeed, your Honor. At

1 this point, Staff calls Jeffery H. Hoagg, H-o-a-g-g,
2 to the stand.

3 (Witness sworn.)

4 JUDGE BRODSKY: Thank you.

5 JEFFERY H. HOAGG,
6 called as a witness herein, having been first duly
7 sworn, was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY

10 MR. HARVEY:

11 Q Mr. Hoagg, do you have before you -- well,
12 first of all, please state your name and spell it for
13 the record, just to be on the safe side.

14 A Jeffery H. Hoagg, H-o-a-g-g.

15 Q Thank you.

16 Now, do you have before you a document
17 consisting of 16 pages of text in question and answer
18 form?

19 A Yes.

20 Q Is that your direct testimony in this
21 proceeding?

22 A Yes.

1 Q Do you have any corrections to that at this
2 time?

3 A No.

4 MR. HARVEY: I would note, for the record, that
5 this was filed on e-Docket on May 18th, 2007. And
6 would move it into evidence at this time.

7 JUDGE BRODSKY: Well, we're not doing e-Docket
8 admissions.

9 Do you have extra copies with you, by
10 chance?

11 MR. HARVEY: I don't, your Honor, but I can
12 easily --

13 JUDGE BRODSKY: Is this exactly the same as the
14 e-Docket material that was circulating?

15 MR. HARVEY: It is identical, your Honor.

16 MR. HARRINGTON: We have extra copies, your
17 Honor, if that would be helpful.

18 JUDGE BRODSKY: That's up to Mr. -- Mr. Harry,
19 I can use theirs or I can use this.

20 MR. HARVEY: It is absolutely identical to the
21 one that was served and filed, your Honor.

22 Use the one you have, that's fine.

1 JUDGE BRODSKY: Very well.

2 MR. HARVEY: And we would, at this point,
3 profer the witness for cross-examination --

4 JUDGE BRODSKY: Okay. All right. And --

5 MR. HARVEY: -- pending a ruling on our motion
6 to admit it into evidence.

7 JUDGE BRODSKY: And thank you for volunteering
8 copies. All right.

9 Any objection?

10 MR. HARRINGTON: No objection.

11 MR. KELLY: No objection.

12 JUDGE BRODSKY: Okay. Then the testimony of
13 Mr. Hoagg, which we'll mark as Staff Exhibit 1, is
14 admitted, subject to cross.

15 (Whereupon, Staff Exhibit No. 1
16 was marked and admitted into
17 evidence.)

18 MR. HARRINGTON: Neutral Tandem has no
19 questions for Mr. Hoagg.

20

21

22

1 CROSS-EXAMINATION

2 BY

3 MR. KELLY:

4 Q Good afternoon, Mr. Hoagg. My name is Hank
5 Kelly. We met, I'm counsel for Level 3
6 Communications.

7 Just so we can get some terms down,
8 how would you describe or define indirect
9 interconnection?

10 A Well, it's a very general matter. At the
11 highest matter of generality, we have two carriers
12 that there is some sort of intervening party or
13 facilities that exist between the two parties when
14 the exchange traffic, you know, presumably back and
15 forth. A tandem transit provider is a good example.

16 Q Okay. And those two parties that you
17 describe, the originating party and the terminating
18 party, they use that intervening third-party for
19 equipment or facilities, I think you said, to still
20 exchange traffic?

21 A Correct. That would be the point of the --
22 of the interconnection.

1 Q Okay. And just describe -- I know it's an
2 obvious one -- but direct interconnection.

3 A In contrast, direct interconnection,
4 certainly as I'd understand it -- I'm not an
5 engineer. You know, I don't know the specifics --
6 but, again, at a high level of generality, they --
7 the two parties that want to -- that need to exchange
8 the traffic, they run in some fashion or another
9 facilities owned by each party -- or, perhaps, leased
10 from another party, but leased for the purposes of
11 one or both of the parties -- and directly,
12 physically interconnect those in some fashion for the
13 exchange of traffic without any intervening
14 third-party facilities or functionalities.

15 Q Okay. And I think you said in your
16 testimony that the real key to the interconnection,
17 whether it be direct or indirect, is to exchange
18 traffic?

19 A Right. It's my view -- and, again, you
20 know, neither a legal view nor an engineering view;
21 but it's my view that interconnection really has no
22 purpose other than to exchange traffic.

1 Now, it may be that there are specific
2 limited reasons for carriers to interconnect other
3 than to exchange traffic, but I don't know what those
4 are. Just as a general matter, it's -- I mean, it's
5 to exchange traffic.

6 Q And from the Commission's -- or the
7 Commission Staff's perspective, the real key to its
8 policy-making recommendations is to just ensure that
9 traffic is exchanged; would you agree with that?

10 A Yes, to -- that's the fundamental objective
11 or consideration. There may be other, you know,
12 secondary, tertiary considerations, but that's the
13 fundamental one, yes.

14 Q And we're here in this dispute because
15 Neutral Tandem is claiming that Level 3 must
16 establish a direct interconnection arrangement; would
17 you agree with that?

18 Is that your understanding of Neutral
19 Tandem's complaint?

20 A Well, I'm not -- I'm not sure that that's
21 my understanding of the dispute. It certainly is a
22 part of Neutral Tandem's position, as I understand

1 it, that the connection with Level 3 should be a
2 direct connection. I've always understood -- as I
3 indicate in my testimony, I think what lies more at
4 the bottom or what I thought precipitated the dispute
5 specifically was issues of money and, in particular,
6 whether or not Neutral Tandem was liable to pay
7 certain payments to Level 3.

8 So I understood that both parties
9 would be at least amenable to maintaining a direct --
10 the existing direct connection provided financial --
11 provided financial aspects were agreed upon, but it
12 certainly is true. Their preference -- in fact,
13 their -- their -- I think it's correct to say, their
14 need from their standpoint is for a direct connection
15 with Level 3.

16 Q And, again, you understand that there's
17 approximately 18 or 19 Neutral Tandem customers
18 that -- in Illinois that would want to use -- or,
19 according to Neutral Tandem, want to use Neutral
20 Tandem to route traffic to Level 3?

21 A Yes, that's my understanding.

22 Q And do you have any information to know

1 whether without the Neutral Tandem traffic
2 interconnection with Level 3 to know that those 18 or
3 19 Neutral Tandem customers could not otherwise route
4 traffic or exchange traffic with Level 3 via another
5 means?

6 A Exchange traffic with Level 3?

7 Q Correct.

8 A It -- I'm not a hundred percent clear, but
9 here's my understanding: That, perhaps, all of those
10 carriers have some facilities that directly connect
11 them with an AT&T tandem switch of some sort. And
12 that at least some of the traffic -- and that
13 Level 3 is connected with AT&T tandem switches. And
14 that at least some of the traffic that right now
15 flows back and forth between these other CLECs and
16 Level 3, at least some of them could go through AT&T
17 tandems.

18 I understand that there is a dispute
19 as to, for example, whether all of it could without
20 augmentation, et cetera, et cetera; but I certainly
21 understand that at least some of it could.

22 Q Well -- and your understanding is that to

1 the extent that some of it could not, that that's a
2 temporary thing that I think Neutral Tandem
3 acknowledges that at some point in the relatively
4 near future trunks could be augmented or facilities
5 could be put in place such that all 18 of those
6 customers could route a hundred percent of their
7 traffic to Level 3 through AT&T?

8 A Right. I certainly do understand that,
9 that it would be physically possible that, you know,
10 whatever would be required -- and there's some
11 dispute about, perhaps, what specifically might be
12 required, but whatever could be -- whatever is --
13 would actually be required to route all the traffic,
14 could be accomplished. You know, there's disputes
15 about how long, et cetera, et cetera.

16 The only thing I would note about
17 that, if I can, is that it's certainly my
18 understanding at this point that those CLECs, that is
19 not their desire. That's my understanding.

20 Q Because Neutral Tandem charges less than
21 AT&T?

22 A Well, I don't know -- yeah, I don't know

1 specifically why they route their traffic through
2 Neutral Tandem. There could be any number of
3 reasons. One has to assume that at least a major
4 factor -- or at least a factor is price. And
5 certainly it -- I think we have -- it's certainly --
6 my understanding certainly is that Neutral Tandem's
7 price, if one looks at it, you know, sort of an
8 aggregate, is going -- is lower than AT&T's for the
9 same function -- you know, for comparable
10 functionalities so that one -- you know, I certainly
11 assume that it is a factor. Whether it is the only
12 factor or the primary factor in any and all of those
13 cases, I don't know, but I certainly assume it's one.

14 Q Do you know whether those same customers
15 have a choice or have a preference to route their
16 traffic?

17 I'm not trying to be tricky here, but
18 to preference or route their traffic to the local --
19 the facilities-based local exchange carriers that are
20 not interconnected with Neutral Tandem?

21 I'll strike the question.

22 I'm just trying to point out, there

1 are other CLECs out there that are not directly
2 interconnected with Neutral Tandem?

3 A I must admit, I don't know for a fact; but
4 I certainly deduce that there are some number of
5 CLECs operating in the state that have no -- perhaps,
6 no connection at all with Neutral Tandem, but
7 certainly no direct interconnection to Neutral
8 Tandem.

9 Q Okay. Well, just for CLEC A, with an
10 originating customer, and CLEC B, a terminating CLEC,
11 would you agree that it's reasonable for the two
12 CLECs to establish indirect interconnection to
13 exchange traffic?

14 A That, you know, as we -- we've heard a lot
15 of discussion about this. The answer is, yes.
16 That's a function of many things and, perhaps, the
17 primary one being the volume of traffic involved.

18 So if -- you know, here's my view on
19 that: If there is traffic going from one of the
20 carriers to the other, that is, an end-user of one of
21 the carriers picks up the phone and wants to talk to
22 an end-user of the other carrier, there has to be

1 some kind of connection, be it indirect or direct, to
2 allow that to occur.

3 Q And it's reasonable for the CLECs to
4 establish either direct or indirect to exchange that
5 traffic?

6 MR. HARVEY: If counsel -- go ahead, please.

7 THE WITNESS: Yes -- well, you know, the -- the
8 question is not real specific in terms of the
9 circumstances; but, yes, it's reasonable -- well, in
10 this case, the out- -- I will say, of course, that
11 it's required that there be some kind of
12 interconnection.

13 And under various circumstances, it's
14 reasonable for it to be direct, under some
15 circumstances, indirect. That's a function of any
16 number of considerations. I will go just a bit
17 further. We'll see if you don't mind.

18 BY MR. KELLY:

19 Q It depends on the answer.

20 A Exactly.

21 Q It depends on what you say.

22 A Exactly.

1 If the two parties agree on the type
2 of interconnection. Okay. Let's say both parties
3 say, Yes, let's -- you know, we've got traffic that's
4 going back and forth, let's do an indirect
5 interconnection of some sort, period, end of story,
6 from my standpoint -- personal standpoint.

7 If the two parties disagree, one says,
8 Look, I want a direct interconnection for X, Y, Z
9 reasons, the other says, Look, I want an indirect
10 interconnection, then, of course, we've got some kind
11 of an issue and it is -- and that is, of course, part
12 of at least -- as you started this line of
13 questioning -- that's part of at least what's going
14 on in this dispute. You know, we have a difference
15 of opinion about the types of interconnection desired
16 and a difference of opinion about who's obli- -- you
17 know, what obligations apply to which carriers, et
18 cetera, et cetera.

19 Q Okay. Well, as to the originating CLECs in
20 this dispute who want to terminate traffic to
21 Level 3, you're not aware that Level 3 has in any way
22 refused indirect interconnection with any of those

1 originating carriers, correct?

2 That's a "yes or no" answer -- or
3 that's a question that I'm looking for a "yes or no"
4 answer to.

5 You're not aware of any such refusal
6 by Level 3 to indirectly interconnect with any of
7 those carriers?

8 MR. HARVEY: If counsel might -- indirectly
9 interconnect through somebody or other, right? Is
10 that the --

11 MR. KELLY: Yes, including AT&T.

12 MR. HARVEY: Okay. That's...

13 THE WITNESS: Right. If -- let me play my
14 answer back to you and I think -- I think it will
15 satisfy you.

16 I'm not a- -- if one asks this
17 question: If one includes either transiting traffic
18 through AT&T or Neutral Tandem, if one includes one
19 of those paths -- you know, both of those paths,
20 under that circumstance, then I'm not aware that
21 Level 3 is refusing to indirectly interconnect with
22 the other CLECs.

1 BY MR. KELLY:

2 Q Okay. And you would agree that other than
3 Neutral Tandem, Level 3 -- or you haven't heard Level
4 3 has refused direct interconnection with any CLEC?

5 A No, I haven't heard that -- any allegation
6 of that.

7 Q And so you would agree that Level 3 is
8 still permitting originating carriers and originating
9 customers to route their traffic for termination to
10 Level 3?

11 A I would agree with that, but I'm going to
12 add just one statement that you may object to. I
13 would agree with that, but I believe that Level 3's
14 position in this docket would require those carriers
15 to terminate their traffic to -- to exchange their
16 traffic with Level 3 in a manner that they do not
17 choose to; that is, you want them to send traffic
18 through the AT&T tandem, and they're revealed
19 preference, as I understand it right now, is to send
20 their traffic to you through the Neutral Tandem
21 facilities.

22 Q But Level 3 is not refusing to exchange

1 traffic with those originating carriers, correct?

2 A That's correct. Again, I would just add
3 what I just added in the last case; but I agree with
4 you, you are not refusing to accept traffic from
5 those carriers.

6 Q Are you recommending in your testimony --
7 well, strike that.

8 You are not recommending -- I didn't
9 see it in your testimony -- that the Commission order
10 Level 3 to directly and physically interconnect with
11 Neutral Tandem; is that correct? It's not in your
12 testimony?

13 A That is not in my testimony. As a general
14 matter, I did not -- because we're still in the
15 process of the case. From Staff's standpoint, we're
16 trying to hear everything that all parties have to
17 say. So I shied away in my testimony from specific
18 recommendations that I believe the Commission should
19 do this or that because I'm still trying to see what
20 all the potential options might be.

21 But -- could you repeat the question.

22 Q I'm just saying, in your testimony, you

1 don't recommend that Level 3 establish a direct and
2 physical interconnection with Neutral Tandem?

3 MR. HARVEY: I think we'll stipulate that we do
4 not so recommend --

5 MR. KELLY: Okay.

6 MR. HARVEY: -- that a specific -- that -- what
7 you just said, that a specific point of
8 interconnection -- or strike that.

9 I -- based on our belief that there is
10 currently physical interconnection between the two
11 parties.

12 THE WITNESS: If I can say something else, I
13 mean --

14 BY MR. KELLY:

15 Q Go ahead.

16 A -- your question had to do with what's in
17 my testimony. And I certainly do not, in my
18 testimony, explicitly say anywhere, I recommend,
19 Commission, that you, at this point, you know, I
20 don't know, issue an order or a directive to Level 3
21 that Level 3 in- -- or directly connect with Neutral
22 Tandem. And so I don't do that.

1 Q Okay.

2 A If I can add one other, toward the end of
3 the case, if I were to testify again or -- I think it
4 is possible that Staff might take that position in
5 its final briefs, you know, putting aside what my
6 attorney just said.

7 MR. HARVEY: Fair enough.

8 BY MR. KELLY:

9 Q If Neutral Tandem -- I mean, you talk about
10 on Page 5 the public interest served by the
11 Commission, et cetera?

12 A Right.

13 Q If Neutral Tandem ultimately prevails and
14 is permitted to establish a direct and physical
15 interconnection arrangement with Level 3 and
16 terminate calls for free and the calls of all the 18
17 of the Neutral Tandem customers continue to be routed
18 in the same manner as it is today, would this be
19 against the public interest?

20 A Could you repeat.

21 Q Sure.

22 If Neutral Tandem prevails in the

1 complaint and interconnects -- establishes -- the
2 Commission orders Level 3 to establish a direct and
3 physical interconnection between Neutral Tandem and
4 Level 3 and all of Neutral Tandem's 18 customers can
5 route their end-user traffic directly through -- or
6 in a transit manner through Neutral Tandem, this
7 would not be against the public interest?

8 A That's correct. At this point, if such an
9 outcome were to come about, I don't see at this
10 point, given everything I've heard to this point,
11 that that would be counter to the public interest.

12 Q And, hypothetically, if Neutral Tandem
13 agrees to pay Level 3 for the termination of that
14 traffic and all the calls of all 18 of the customers
15 get routed and get terminated from Level 3, that
16 also -- that result would not be against the public
17 interest?

18 A That's correct. If -- let's assume that
19 that -- the fact circumstance that you just set forth
20 in that question, if that had happened, I don't know,
21 maybe January 1st of this year, as I understand it,
22 we wouldn't be here today.

1 If that -- if such a voluntary, you
2 know, agreement between the two parties came about
3 even now and that occurred and the traffic kept
4 flowing and the two parties shook hands, that
5 would -- I'd see nothing that would run counter to
6 the public interest under that circumstance.

7 Q Okay. Final hypothetical, if Level 3
8 prevails in this case and the Commission does not
9 order a direct and physical interconnection with
10 Neutral Tandem and all 18 of the Neutral Tandem
11 customers are able to route their traffic through
12 AT&T and the calls are exchanged and the end-user --
13 the originating customers are able to complete their
14 calls through Level 3, that also would not be against
15 the public interest, correct?

16 A I hate to say it, but I don't think -- at
17 this point, I can't agree with that.

18 Q Because Neutral Tandem's customers would
19 then be paying a higher price for the transit traffic
20 through AT&T; is that why?

21 A In my opinion, that higher price -- I mean,
22 I don't -- no. The answer to your question is "no."

1 The higher price is what it is and what it might be.

2 I'm thinking more along the lines --

3 along two lines. Number one, under that

4 circumstance, the originating carriers would be being

5 forced to do something that they do not want to do.

6 Okay. Combine that with the fact that I believe that

7 that outcome would not be consistent with what I

8 understand to be, in effect, the rules of the game,

9 all right, laid down primarily by the FCC for

10 exchange of traffic and the regime that controls --

11 the regulatory regime that controls the exchange of

12 traffic.

13 For those two reasons, I don't think

14 it -- I don't believe it would be consistent with the

15 public interest if -- at this point I don't believe

16 that would be consistent with the public interest if

17 the Commission were to do that.

18 It appears that unless the two parties

19 can come to an agreement, in my view, as I understand

20 it, there is going to be coercion, regulatory

21 coercion of some sort. I expect that to happen. The

22 question sort of in my view -- the question in my

1 view is, if that regulatory coercion, saying, you
2 know, the Commission is going to direct somebody to
3 do something that they otherwise wouldn't really
4 prefer to do, if that's going to occur, it's in the
5 public interest that that occur in the least
6 intrusive manner and in the manner most consistent
7 with existing regulatory schemes that have been laid
8 down by the FCC in particular and this Commission as
9 well.

10 Q Are you aware of any state statute or
11 regulation that you believe the Commission could rely
12 upon to coerce a direct and physical interconnection
13 between Neutral Tandem and Level 3?

14 A A specific statute that they could rely
15 upon? Well, more generally, as I testified, there
16 are -- I believe there are a number of provisions in
17 the PUA that are applicable and the Commission can
18 rely upon to direct one or both of the parties in
19 this dispute to do something to make sure that the
20 required interconnection, whatever type it is,
21 whatever the nature of it is, and the required
22 exchange of traffic occur.

1 And by "required," I mean, you know,
2 that's in the public interest, that the Commission
3 determines as -- you know, in its role as carrying
4 out the general assembly's intent with PUA, that --
5 yes, I think those are -- at a general level, that
6 they are all there.

7 Now, is there a specific statute --
8 going back to your specific question, getting that --
9 is there a specific statute that veers directly in
10 plain language about direct interconnections and that
11 kind of thing? No. And the -- and it's my view that
12 the Commission has to read all of those provisions
13 and decide what outcome best effectuates those
14 provisions and is most consistent.

15 Q Could the Commission apply those principals
16 to compel -- or to require other CLECs to directly
17 interconnect with Level 3?

18 A In my -- well, you're asking a
19 hypothetical, right?

20 Q Sure.

21 A I mean, in a sense it's a hypothetical.

22 In my view the answer is "yes." Now,

1 whether or not that would be justified -- you know,
2 it would depend on the circumstances; that is, you
3 know, we're talking about a hypothetical situ- --
4 we're talking about a situation where we don't have
5 any fact circumstances behind it; but if the facts --
6 if the circumstance is warranted, yes, I believe the
7 Commission would be -- would be not only within its
8 authority to do so, but I believe the Commission
9 would be under certain -- you know, depending upon
10 the fact circumstances, the Commission would be
11 obligated, you know, to make such determinations to
12 make sure that the intent of the PUA, you know, is
13 translated into what happens in the
14 telecommunications markets in Illinois.

15 Q So the PUA -- or I'm sorry -- the
16 Commission could order, based on what you're
17 thinking, could order each of the 18 Neutral Tandem
18 customers to directly interconnect with Level 3,
19 right? Under the right circumstances, right?

20 A Well, under which circumstances?

21 I believe as a general matter, they
22 could. Now under what circumstance would the

1 Commission do such a thing? You know, we'd have
2 to -- you know, we'd have to see what the
3 alternatives were. We would have to see -- you know,
4 weigh the competing considerations.

5 But, as a general matter, I believe
6 they could, again, if the circumstances were -- if
7 the circumstances called for that.

8 Q And those circumstances -- the Commission
9 could also compel Neutral Tandem to directly
10 interconnect with Level 3 for Level 3's originating
11 traffic to Neutral Tandem, right?

12 A I'm sorry. Repeat.

13 Q Sure.

14 This complaint, this issue is about
15 direct physical interconnection between Neutral
16 Tandem and Level 3 for the transport of traffic
17 terminating to Level 3. That's what this case is
18 about. So I'm asking a hypothetical.

19 Could those circumstances apply or
20 your thinking apply to compel the -- or have the
21 Commission compel Neutral Tandem to accept traffic
22 from Level 3 that would be transited then to other

1 parties?

2 A I keep saying as a general matter, that
3 is -- I'm going to answer -- I want to answer the
4 question, but I'm -- I want to totally delink it,
5 disassociate it from this case in terms of just
6 answering the question.

7 Yes, as a general, is that within the
8 Commission's authority? Could the Commission do
9 that? If it, after hearing and, you know,
10 deliberation and everything else, determined that
11 that was the appropriate action to take under the PUA
12 and under those facts and circumstances, absolute- --
13 I absolutely believe the Commission could do that.

14 Q What are the factors -- specifically, all
15 of the factors, if you could state them, that you
16 believe would or could or should compel the
17 Commission to order direct physical interconnection
18 between Neutral Tandem and Level 3 for the delivery
19 to Level 3 of this transit traffic?

20 A That's a huge question; that is, if I
21 understand it -- understood the question correctly.
22 It's like, you know, recite, you know, all the

1 circumstances under -- which might warrant that, that
2 direct -- ordering that direct --

3 Q In this case.

4 A Okay. Now, if we restrict it to everything
5 I understand about this case?

6 Q Yes.

7 A So let me see if I understand the question.
8 Clearly my recommendation to the Commission right now
9 would not be what you just described.

10 Q Right. I think you said that that's not
11 your testimony.

12 A That's not what I would recommend certainly
13 at this point. That's not what I anticipate the
14 Staff will ultimately, specifically recommend to the
15 Commission.

16 Therefore, you know, the facts of this
17 case don't seem to -- I don't think I can cite any
18 facts in this case to answer your question. Let me
19 make a few up, for example, just to try to answer the
20 question.

21 Q I don't want to make a few up.

22 I mean, because you don't know, as you

1 sit here in the stand, what factors that you -- that
2 would support your recommendation to have the
3 Commission compel direct physical interconnection
4 between Neutral Tandem and Level 3?

5 A Okay. Let me think about that a bit. Yes,
6 I think I can answer.

7 MR. HARVEY: Okay. Go ahead.

8 THE WITNESS: Because I think I got a little
9 bit confused here or the emphasis was a little
10 different.

11 I think that we have the fact
12 circumstance where the Commission ultimately -- I
13 believe, ultimately should and maybe will have to
14 compel one of the parties to this dispute to maintain
15 at least an established direct physical
16 interconnection. And, you know, it's no surprise,
17 after reading my testimony, it looks like it might be
18 Level 3.

19 However, the fact circumstance is, we
20 have two parties that -- well, actually -- actually,
21 we have -- we only have two parties to the
22 proceeding; but, of course, we have a number of

1 parties that have an interest sort of in the outcome
2 in this instance, in my belief, that at least, you
3 know, something on the order of 18 CLECs want to
4 continue to route their traffic through Neutral
5 Tandem to you through a direct physical connection
6 between Neutral Tandem and Level 3. Okay.

7 So under the circumstance where the
8 origi- -- the carrier's originating traffic have
9 chosen a certain way to -- to accomplish an indirect
10 interconnection, and that way to accomplish that
11 indirect interconnection is -- you know, involved in
12 that is a direct physical connection between you and
13 Neutral Tandem.

14 Okay. I think the -- my test- -- much
15 of my test- -- or at least a point in my testimony is
16 that the Commission has -- it looks like the
17 Commission is going to have to weigh the impeding
18 considerations. And, in this case, it appears, to
19 me, that the desires do -- or the -- yes, the desires
20 of the -- of carriers that are originating the
21 traffic that's at issue, to route it through Neutral
22 Tandem as their transiting carrier is enough to,

1 under the circumstances, if necessary, you know,
2 warrant the Commission compelling one or both of
3 these parties to have -- to maintain a direct
4 connection.

5 BY MR. KELLY:

6 Q You haven't talked to any of those 18
7 customers, have you?

8 A No.

9 Q You haven't asked discovery requests of
10 those carriers' customers, the Neutral Tandem
11 customers?

12 MR. HARVEY: We'll agree that we haven't.

13 THE WITNESS: No. Again, you know, they
14 have -- you know, I consider it that they have
15 revealed their wish to route their traffic to you
16 through Neutral Tandem as opposed to the AT&T tandem.

17 BY MR. KELLY:

18 Q I see.

19 Are you aware of whether they don't --
20 strike that.

21 A Or route most of their traffic.

22 Q Isn't it true that they also route

1 traffic -- or could route traffic through AT&T?

2 A Yeah, I answered in the affirmative
3 earlier, that is true. And I don't know how much.
4 It's my understanding -- and I may be wrong -- that
5 whatever traffic sort of gets -- whatever traffic
6 gets routed through the AT&T tandem from those
7 carriers to you is in some way relatively minor,
8 perhaps.

9 Q But you don't know that, do you?

10 A No, I don't -- well...

11 Q For all you know, they could be routing a
12 majority of their traffic or some of those 18
13 customers could be routing a majority of their
14 traffic through Neutral Tandem -- or through AT&T,
15 right?

16 A Let me think about that for a second.

17 Q Sure.

18 I mean, Neutral Tandem -- I think we
19 talked yesterday --

20 MR. HARVEY: Well, there's a question pending
21 if he's going to answer it.

22 THE WITNESS: Yeah, you're right. I guess I

1 don't know for certain that there isn't, for example,
2 as much traffic going through AT&T tandem from these
3 guys for termination to you as through the Neutral
4 Tandem tandem. I don't believe that's the case.

5 Everything I've heard suggests to me
6 that that's not the case, but I don't know that. I
7 don't know the amount of traffic. I think I know the
8 amount of traffic going through the Neutral Tandem
9 facilities. I don't know the amount of traffic going
10 through the AT&T tandem.

11 BY MR. KELLY:

12 Q To establish or maintain this direct
13 physical interconnection that we talked about between
14 Neutral Tandem and Level 3, would that be pursuant to
15 some agreement or contract that the Commission would
16 compel?

17 A Well, hopefully not in this sense. And
18 certainly, as I understand it, to be Level 3's
19 position, there are interconnection arrangements
20 between carriers that are directly subject to
21 Commission ordeal. And those are such arrang- --
22 such agreements, arrangements that involve an ILEC.

1 Now, as a general matter, again, you
2 know, the vast bulk of such arrangements where CLECs
3 are involved and there's no involvement of an ILEC,
4 as is in my testimony, but the basic thinking is that
5 the CLECs are -- are generally going to be -- you
6 know, have comparable -- you know, are not -- one of
7 them does not have all of the various advantages or
8 whatever that an ILEC has.

9 Therefore, as a general manner, when
10 they make interconnection and traffic exchange
11 arrangements, there would generally be no need for a
12 Commission review. And, of course, these happen day
13 in and day out, whatever you call them, and the
14 Commission doesn't review them.

15 However, there are times like these
16 when there is some question that arises -- question
17 or questions, disputes or whatever, that could come
18 to the Commission through various means -- in this
19 case it's a complaint -- where the Commission has to
20 examine and review an aspect or aspects of those
21 arrangements to make sure. The Commission would
22 rather not be put in that position, I'm sure. I

1 mean, I have no desire to, you know, be involved in
2 CLEC or CLEC arrangements.

3 But where they -- where disagreements
4 occur and disputes occur that can directly impact the
5 public interest in terms of, uh-oh, traffic may not
6 be exchanged, all of it, okay, okay, or one of the
7 parties coerces the other party. I mean, it's okay
8 if the Commission coerces a party, but it's not okay
9 if one of the -- one does -- coerces the other one.
10 So that's a long-winded answer, but that's where we
11 are.

12 Q Okay. But it would be pursuant to a
13 contract? The direct physical interconnection
14 arrangement -- there'd have to be some terms and
15 conditions laid out?

16 A I'm not sure there would be. It doesn't
17 necessarily -- you know, see if this answers your
18 question: Generally it is pursuant to some kind of a
19 piece of paper called an agreement, a this or a that,
20 contract, whatever. I mean, theoretically,
21 certainly, I believe it's certainly possible that two
22 CLECs could exchange traffic pursuant to their

1 tariffs only. Their tariffs could be -- they
2 could -- in fact, they could maybe look at each other
3 and say, You know, we don't like each other very
4 much. You know, we don't even want to sit down and
5 do an agreement. Let's go off -- we'll both go off
6 and do our own tariffs and then we'll pass them back
7 and forth and see if the tariffs are comprehensive
8 enough and cover all the -- so that we could just
9 exchange our traffic subject to your tariff and my
10 tariff.

11 That's theoretically possible. I
12 don't know that it happens. I agree with you that,
13 certainly, you know, some type of agreement where
14 they sit down and work it off, a tariff, and outside
15 of the Commission's view, okay, almost always occurs.

16 Q Well, what happens if the -- if the parties
17 aren't able to reach an agreement on the exchange or
18 the traffic -- or -- I'm sorry -- the direct physical
19 interconnection, how would those issues get resolved?

20 For example --

21 MR. HARVEY: If I might just ask for a point of
22 clarification, Counsel.

1 Is this question presuppose a
2 Commission order that requires the direct physical
3 interconnection to be either maintained or
4 established?

5 MR. KELLY: Yes. Thank you for that
6 clarification. That may help Mr. Hoagg.

7 THE WITNESS: Then I better hear the question
8 with that imbedded in it so I can understand.

9 BY MR. KELLY:

10 Q Assuming that the Commission issues an
11 order to require the parties -- or one or two of the
12 parties to maintain or establish direct physical
13 interconnection and where the parties could not reach
14 agreement on all of the terms and conditions, the
15 type of fiber or copper or physical facility to be
16 interconnected, how would those issues get resolved?

17 A Well, that would depend on the
18 circumstances, but I could see one -- one way. I
19 mean, if this is the circumstance we're talking
20 about, this is the hypothetical we're talking about,
21 the Commission directs the two parties to exchange
22 traffic in the following manner. Okay. And, you

1 know, it involves I think your -- I think your
2 question was it involves a direct interconnection,
3 but then the parties go off and keeping fight- -- and
4 fight about specific aspects of it.

5 Under that kind of circumstance, one
6 thing that could happen -- one thing that very well
7 could happen is the Commission says, Well, if you
8 guys keep fighting, traffic's going to fall to the
9 floor. Okay. We're not going to have that.

10 Q Well, let's just -- take that out of the
11 equation. Assume there's no traffic going to fall to
12 the floor, but the parties still can't reach an
13 agreement on some term and condition with respect to
14 the interconnection agreement.

15 A Okay.

16 Q How would those issues get resolved?

17 A The Commission would adjudicate it in some
18 fashion. Procedurally I'm not sure. You know, it
19 would depend, but the Commission would adjudicate it
20 in some fashion.

21 Q So there would be almost like a Section 251
22 or Section 252 arbitration proceeding that's called

1 for under federal law?

2 A No -- oh --

3 Q Something like that, I'm not saying that
4 that would --

5 A Yeah, there would be -- well, to be honest,
6 the circumstance -- the hypothetical sort of that
7 you're proposing, I would expect that almost -- that
8 under almost any circumstance like that -- what I
9 actually expect to happen is what's happened here;
10 that is, there are sufficient -- this is my view. I
11 know you guys don't -- don't share this view, but I
12 believe that there are sufficient rules, regulations,
13 et cetera, in both federal and state statutes and,
14 you know, administrative code and so forth to govern
15 these CLEC interconnections fairly tightly. Okay.
16 That is -- you know, certainly there's -- these
17 are -- and these are default ones in many respects;
18 that is, hey, if you guys can't agree -- I mean, if
19 you guys -- recip comp, for example, just to
20 illustrate --

21 Q Well, how about let's use my example, the
22 fiber versus copper interconnection.

1 A Okay. All right. All right. And you guys
2 can't agree. Well, if there's an applicable rule,
3 one of the carriers -- just like here, one of the
4 carriers is going to say, I'm going to take -- you're
5 not doing what I believe is required under, you know,
6 all the rules, regulations, et cetera, that apply to
7 CLECs, you know. I'm going to complain to the
8 Commission, comes to the Commission, Commission
9 adjudicates it. That, I think, is probably what
10 would happen almost all the -- you know, most all the
11 time.

12 Q What if there's not a rule governing the
13 interconnection facility to -- between Neutral
14 Tandem --

15 A Then if the two part- --

16 Q Let me finish my question.

17 A I'm sorry.

18 Q -- between Neutral Tandem and Level 3? How
19 would the Commission resolve that?

20 A That's right. Then if the two part- -- if
21 there is no such applicable rule, okay -- I mean, I
22 cannot -- that's a counter-factual circumstance that

1 I cannot imagine that there is nothing to guide the
2 Commission, but let's -- I mean, I would concede that
3 at least theoretically that's possible. Okay. Let's
4 assume that we have something like that. I don't
5 think we'd ever see it in fact, but let's assume we
6 do.

7 Well, the Commission would just have
8 to weigh all the competing considerations and apply
9 its judgment as to the proper way to interconnect
10 that would be in the public interest.

11 Now, one of the considerations in that
12 might be just -- for example, might be -- which I
13 think -- which I think would be proper would be under
14 circumstances like that, but all other circumstances
15 as well, the Commission would want to consider, among
16 everything else it would have to consider, that,
17 well, that resolution that is least intrusive -- from
18 a regulatory standpoint that is least intrusive, all
19 else equal would be desired. Okay.

20 Q How long would this -- how long would this
21 maintaining or establishing interconnection last? In
22 perpetuity?

1 A Well, it -- it would last as long as
2 traffic -- a couple of things: As long as traffic
3 needed to be exchanged, okay, to make sure that the
4 traffic was exchanged. It could potentially last in
5 perpetuity. And it would last as long as the
6 underlying dispute between the parties required
7 resolution.

8 If they, a month later, said, Oh, you
9 know, that fight we were having -- the two of them
10 came together and said, You know what, the Commission
11 told us to do X. You know, the Commission said, you
12 know, This is the way it's going to be done; but you
13 know what -- one of them went to the other one and
14 said, Let's do Y. Don't you think Y would be better
15 for both of us because the Commission really doesn't
16 know what it's doing half the time?

17 I didn't say that.

18 MR. HARVEY: And it's not Mr. Hoagg's opinion
19 or the opinion of his counsel.

20 THE WITNESS: I don't share that opinion, but,
21 you know, sometimes the Commission imposes, you know,
22 solutions that just don't make sense from a business

1 perspective. So let's do Y.

2 MR. HARVEY: Although not neither of our
3 memories.

4 THE WITNESS: Yes, I'm not aware of such a
5 thing.

6 We never thought about Y before.
7 Let's do that.

8 BY MR. KELLY:

9 Q What if Neutral --

10 A And they said, Okay, we'll do that.

11 Now, as long as that doesn't have
12 anything attached to it that was against the public
13 interest -- I mean, if Y involved, oh, yeah, and to
14 make Y work we have to go rub out Mr. Z, okay, if we
15 agreed to do that, well, the Commission would say,
16 No, you better keep doing X because doing Y wouldn't
17 be consistent with the public interest. But as long
18 as it was consistent with the public interest, unless
19 there was some reason, you know, then the
20 Commission's order would fall by the wayside, you
21 guys would do what we would like you to do all the
22 time, which is, of course, agree between the two

1 parties.

2 Q Do you mean that -- let's assume that 8- --
3 17 of the 18 Neutral Tandem customers go to a
4 different tandem provider -- or decide to route all
5 of their traffic through AT&T, for whatever reason --

6 A Yes.

7 Q -- would the direct interconnection
8 arrangement between Neutral Tandem and Level 3 still
9 be required because that one remaining customer chose
10 to route their traffic to Neutral Tandem?

11 It's a problem, isn't it?

12 A No, that's a tough question.

13 I have to say that because of what I
14 believe the rules to be and the application of the
15 rules, if the one carrier, the originating carrier
16 says, Here's how I want to deliver my traffic to you,
17 Level 3. Okay. I'm using Neutral Tandem as the
18 extinct- -- the preferred extinction of my network to
19 get to you.

20 As I said in my testimony, because
21 termination is -- has a very strong bottleneck
22 attributes -- that's why I think the rules say, you

1 terminate whatever traffic is sent to you. Okay.

2 You terminate it, period. End of story.

3 Q Well, Level 3 is not refusing, though --

4 A No. Understood.

5 Q You said before Level 3 is not refusing to
6 terminate anybody's traffic?

7 A But somebody -- see, somebody gets a choice
8 here. I mean, it -- and in your statement of the
9 case, I must say is a bit different than how I stated
10 it in my testimony. And if we take your statement of
11 the case, if that is the case and the two parties
12 simply cannot -- they remain at larger heads, then the
13 Commission has to tell one or the other of the
14 parties, You're going to interconnect in way that's
15 not your first preference. Okay.

16 Q Okay. But answer my question, though.

17 If there's only one Neutral Tandem
18 customer remaining, should that direct
19 interconnection, the maintenance and -- under this
20 hypothetical, still remain?

21 A Yeah, I started to answer it, but I got way
22 off track.

1 Yeah, because I think the rules say
2 that -- I think the rules say that that's rule.

3 Q Which rule?

4 A I think the rules.

5 Q Which rule?

6 A Various FCC rules.

7 Q Okay. You're aware that Neutral Tandem
8 hasn't made any claim in its complaint under federal
9 law, right?

10 A I certainly think that's right. I
11 certainly think that's right. And that's, you
12 know -- that's one of the reasons why I shied away in
13 my testimony from my specifics about remedies. Okay.

14 Again, we're still -- we're still
15 trying to understand all aspects of this dispute.
16 Okay.

17 Q Now, I want to talk to you about the
18 existing -- or the contract that was terminated
19 between Neutral Tandem and Level 3 back in January.

20 JUDGE BRODSKY: Mr. Kelly, is this a good
21 transition point?

22 MR. HARVEY: How much more does he have, your

1 Honor, I mean...?

2 MR. KELLY: I have -- we'll take a break.

3 JUDGE BRODSKY: Okay. Let's take about
4 15 minutes.

5 (Whereupon, a recess was taken.)

6 JUDGE BRODSKY: Okay. So we're back.

7 Before we get started, I don't care if
8 there's five minutes or five hours left, but we are
9 taking lunch at 2:00 o'clock.

10 So with that, let's go back on the
11 record.

12 MR. KELLY: Okay.

13 BY MR. KELLY:

14 Q Mr. Hoagg, before we left we were talking
15 about this maintenance and establishing this
16 interconnection arrangement and we were talking about
17 a little bit about what if the parties can't agree on
18 all the terms, like the length of the contract and we
19 went a couple of scenarios there.

20 What if the parties can't agree on the
21 type of traffic to be exchanged?

22 For example, what if one of the

1 parties want to exchange VYP traffic and the other
2 party says, No, we won't exchange VYP traffic, how
3 would the Commission -- or would the Commission get
4 involved in that issue?

5 A That's pretty hypothetical. I mean, it's
6 hard to say if -- I mean, I think it doesn't surprise
7 you to hear me say the following: If Commission
8 involvement was required to make sure that the
9 traffic was terminated, you know, the traffic went
10 from end-user to end-user, that certainly would be
11 sufficient for Commission involvement.

12 It's a little -- you know, it's a
13 little difficult to say, you know, once we -- once we
14 ratch (sic) it down from that level -- but,
15 certainly, you know, that is the touch stone.

16 Q Directing your attention to Page 6 of your
17 testimony, Line 107, you say you also believe the
18 standards for review of such arrangement are not as
19 stringent as those applicable to ILEC interconnection
20 and traffic exchange arrangements.

21 When you say "the review of such
22 arrangements," are you talking about agreements or

1 things that may also be -- or may not be an
2 agreement?

3 A Right. Well, as I indicated elsewhere in
4 my testimony, sir, my focus is on the arrangement
5 itself as opposed to the agreement. I mean, for
6 example -- and what I mean by that -- I mean, it
7 sounds a little absurd, but it's at least conceivable
8 that two parties could be of such a mind that they
9 could just shake hands. They could say, Look, let's
10 exchange traffic the following way. Okay. And, you
11 know, we're -- I mean, this is, obviously,
12 counterfactual because, of course, this is at the
13 core of the thing.

14 Most all of these -- you know, the
15 parties involved, they're competitors in one way or
16 another.

17 Q I think we can limit it to those disputes
18 where there's a dispute because otherwise we wouldn't
19 get the Commission involved. Okay.

20 A All right. Can you repeat the question.

21 Q You were trying to make a distinction
22 between arrangements and agreements and I was

1 saying -- and then you were going to do a
2 hypothetical and I said, Well, why don't we keep it
3 within the realm of where there's a dispute between
4 the parties over the terms and conditions of that
5 arrangements.

6 A Okay. But I've forgotten the question.

7 Q Okay. What do you mean by "arrangements,"
8 do you mean agreements in Line 108?

9 A Well, you know, given your -- as you say,
10 if, in fact, we're talking about a situation such as
11 this where the arrangements are, I don't know,
12 codified in agreements, yeah, you could -- you
13 could -- you could without doing violence to that
14 substitute the word "agreements."

15 Q Okay. Now, we talked about one of the
16 parties might -- in this dispute might have -- might
17 be required by the Court or by the Commission --
18 ordered by the Commission to maintain some
19 interconnection.

20 What is Neutral Tandem's obligation to
21 originating carriers?

22 Does Neutral Tandem have an obligation

1 to route traffic for carriers on the originating
2 side?

3 MR. HARVEY: If I could ask a point of
4 clarification, those carriers with which it is
5 directly interconnected?

6 MR. KELLY: No, those carriers that it does not
7 have an agreement with.

8 THE WITNESS: Okay. If it doesn't have an
9 agreement with a carrier to route traffic?

10 BY MR. KELLY:

11 Q Right.

12 A If it doesn't -- okay. And as you point
13 out, though, you know, these things are done by
14 agreement -- again, and I would underscore that
15 because, by and large, everybody involved is
16 competing one way or another, but needs to cooperate
17 in the exchange of traffic.

18 So if there is no agreement, why would
19 any traffic be going back and forth between Neutral
20 Tandem and this hypothetical carrier?

21 Q Let's say XO Communications --

22 A Okay.

1 Q -- wants to route traffic through Neutral
2 Tandem. What is -- but they don't have an
3 interconnection agreement in place -- or a traffic
4 exchange agreement in place, does -- but XO still
5 wants to route the traffic that way --

6 A Right. Right.

7 Q -- does Neutral Tandem have an obligation
8 to interconnect with it's originating --

9 A No.

10 Q -- those originating characters?

11 A No, because Neutral Tandem is not
12 terminating -- under the circumstances, as I
13 understand you just described, XO is trying -- XO is
14 originating traffic, for example, and needs to
15 terminate that traffic to end-users.

16 Okay. Neutral Tandem is not a
17 terminating -- is not the terminating carrier. It
18 would go to -- you know, so Neutral Tandem, no
19 obligation. Now -- but if we push Neutral Tandem
20 aside and look at the carrier who serves the
21 end-users that traffic is going to, then there are
22 obligations upon that carrier.

1 Q And so by not -- or by refusing to
2 interconnect with those -- XO, in that example,
3 Neutral Tandem could be forcing XO and those
4 originating carriers to route their traffic through
5 Neutral Tandem -- or through AT&T, correct?

6 MR. HARVEY: Hypothetically?

7 MR. KELLY: Yes.

8 THE WITNESS: Well, would -- I would want -- I
9 would answer in this way, that, you know, Neutral
10 Tandem is within -- you know, there's no obligation
11 upon Neutral Tandem to accept their traffic because
12 it's not the terminating carrier.

13 So the answer is, yes. That carrier,
14 the originating carrier has to terminate its traffic.
15 So it's going to have to find a way to do it. And
16 the reason when we look at the end-us- -- the
17 ultimate end-users, the reason we have these various
18 obligations is, okay, whoever is serving the end-user
19 now is going to be obliged to find a way to
20 interconnect with XO in this instance, and XO is
21 going to be obliged to find a way to interconnect
22 with that terminating carrier so that traffic goes

1 from one -- from the calling party to the callet
2 (phonetic) party. That's where the obligations lie,
3 on those two carriers.

4 BY MR. KELLY:

5 Q And that's under federal law?

6 A That's under both federal law and state
7 statute.

8 Q Now, let's talk about where an originating
9 carrier routes traffic through AT&T -- I'm sorry.
10 Strike that -- through Neutral Tandem and there is no
11 interconnection arrangement between Neutral Tandem
12 and Level 3.

13 I think you said earlier that the
14 originating customer -- let's say XO, for example --
15 the originating carrier chooses to route the traffic
16 through Neutral Tandem for termination to Level 3.

17 A Well, again, I think we would --

18 Q And that's the hypothetical.

19 A Right. And I think we agree that the
20 reason it's probably doing that -- well, we would
21 agree -- or I think we would -- I think we would
22 both -- I think we would agree that the originating

1 carrier is choosing an indirect interconnection as
2 opposed to a direct interconnection with Level 3 most
3 likely because the traffic volumes don't warrant the
4 cost -- you know, the economics are such that direct
5 interconnections between the two carriers may not
6 warrant it, aren't called for.

7 So a direct -- an indirect
8 interconnection is the better option. And in the
9 case you're talking about, then the originating
10 carrier says, Okay, I'll take Neutral Tandem.

11 Q Okay. I'm just laying out the
12 hypothetical.

13 XO originates traffic, routes it to
14 Neutral Tandem. You say, I think, before that the
15 originating carrier should be able to allow -- be
16 given the choice to route the traffic to Neutral
17 Tandem and so, therefore, they establish that
18 interconnection arrangement.

19 A Well -- and, again --

20 Q This is foundation. I'm trying to paint
21 the picture.

22 A Okay. But the originating carrier has an

1 obligation. If the calls are going from that
2 originating carrier to Level 3's customers, it has no
3 choice. Somehow or other it has to interconnect with
4 Neutral Tandem because those calls have to go to that
5 end-user.

6 MR. KELLY: May I just use this, your Honor.

7 JUDGE BRODSKY: You may.

8 BY MR. KELLY:

9 Q Okay. I'm just talking about --

10 MR. HARVEY: Could you identify what you're
11 discussing, Mr. Kelly?

12 MR. KELLY: Yes.

13 BY MR. KELLY:

14 Q Let me show you what is a graph or a
15 diagram from Mr. Gates' testimony. I believe on Page
16 18 of his testimony.

17 Neutral Tandem chooses to route
18 traffic to Neutral -- I'm sorry -- XO chooses to
19 route traffic to Neutral Tandem?

20 A Right.

21 Q Okay. And this interconnection arrangement
22 no longer exists?

1 A Right.

2 Q But XO is choosing to route the traffic to
3 Level 3 through Neutral Tandem. Okay?

4 A Okay.

5 Q But this interconnection arrangement no
6 longer exists between Level and Neutral Tandem.

7 Could Neutral Tandem still route that
8 traffic to Level 3 via the AT&T tandem?

9 A Oh, I see.

10 Q And under that --

11 A Sure. Sure. No --

12 Q Let me finish.

13 And under that circumstance, wouldn't
14 XO still be exercising its choice to route traffic
15 through Neutral Tandem?

16 A Okay. Let me answer, I think, the first
17 question first, which is, provided those physical
18 interconnections exist -- which it appears they do,
19 from everything I've heard it appears they do -- so
20 it's a physical manner that could be done.

21 Of course as some Neutral Tandem
22 witness indicated earlier, what would make no sense

1 and would be horribly inefficient, two -- you know,
2 switching the same call through two different
3 tandems. But, yes, the connections are there. Yes,
4 apparently they are, that is true.

5 And XO can say, I'm going to route to
6 Neutral Tandem, goes through the AT&T tandem and ends
7 up at Level 3.

8 The problem with that -- one problem
9 with that -- I'm sorry. I'm still on the first part
10 of the question.

11 One problem with that would be, well,
12 one would think then that -- I mean, as a practical
13 matter, there's a lot more cost involved with that.
14 The price that Neutral Tandem is able to give --
15 previously give to XO probably would be different,
16 but that's an aside.

17 Q But XO still would be able to exercise its
18 choice?

19 A Well, let me put it this way -- that's not
20 clear. That's not clear because you're not -- XO's
21 choice was on routing through Neutral Tandem at such
22 and such cost under such and such conditions you end

1 up at Level 3.

2 Now, if you say, I'm cutting that, it
3 then goes from Neutral Tandem through AT&T's tandem
4 to Level 3. XO all of a sudden is in a sub- -- is in
5 a much different position. Its traffic goes
6 through -- its traffic goes in a way that it never
7 contemplated, never agreed to, okay, never -- its
8 costs -- you know, everything is changed by that
9 different --

10 Q But you're assuming that the price between
11 Neutral Tandem and XO changes.

12 A No, but --

13 Q Why would it change?

14 A No, I'm not assuming that.

15 Q Okay.

16 A Let me give you another silly fact
17 situation.

18 Q Hold on, though.

19 But XO -- I think just to clarify,
20 you're saying that XO gets to choose how the traffic
21 exits its switch for routing to Level 3, right?

22 A I'm saying --

1 Q Isn't that correct?

2 A No, I'm saying there has --

3 Q Isn't that correct?

4 A Let me hear it again.

5 Q Okay. Isn't it -- aren't you saying --

6 because I want to be done by 2:00, aren't you saying

7 that XO gets its choice to route traffic exiting its

8 switch to Neutral Tandem for termination to Level 3?

9 That's that the factor --

10 A I'm saying --

11 Q -- the key --

12 A -- that's not the factor, that's a factor.

13 And I'm saying, yes, they get that choice because

14 they get to choose -- up to the point where the

15 traffic is handed off to Level 3, they get to choose.

16 That's their side of it. They get to choose that

17 arrangement.

18 Q And that's the choice that they should be

19 allowed to be given, to route that --

20 A Yes. Yes.

21 Q Okay. To route the call throughout the

22 network?

1 A No, not throughout the network. They get
2 the choice how they want to route -- since it's
3 incumbent -- you know, you have an obligation and
4 then you also have some choice. Okay. And then --
5 but you also have the obligation.

6 The obligation upon them is to -- when
7 their calling party picks up and dials a Level 3
8 customer, they must deliver that traffic through some
9 arrangements to a place -- to a point where it is
10 handed off to Level 3 for termination -- for ultimate
11 termination to the end-user.

12 That originating carrier, it's their
13 choice up to that point of handoff how they want to
14 do that. That could be all their network. They
15 could have no network facilities at all, really,
16 bar -- you know, and lease those all from somebody
17 else. Okay.

18 Q Okay. So you're saying that it is XO's
19 choice to route traffic through Neutral Tandem and by
20 virtue of that choice, Neutral Tandem and Level 3
21 have an obligation to establish direct physical
22 interconnection; isn't that true?

1 A I'm -- yes. I'm saying that under all of
2 the applicable federal and state statutes, when XO
3 chooses to put that traffic to a point where it's
4 going to be handed off to you and it's chosen Neutral
5 Tandem, okay -- well, no. I'm going to modify my
6 answer.

7 If XO -- to answer your question, if
8 XO were totally indifferent as to whether or not it
9 was a direct connection between you and Neutral
10 Tandem or an indirect connection between you and
11 Neutral Tandem utilizing the AT&T tandem, if XO were
12 totally indifferent about that, they said, you know,
13 If you want to do it that way, that's fine with me
14 and you wanted to do it that way, what you do, and
15 Neutral Tandem were okay with doing it that way, then
16 it could be done then. Then, period. End of story.
17 It would be done that way. All right.

18 The problem is, you want to do it that
19 way; Neutral Tandem doesn't. We have a disagreement.
20 The disagreement can't be resolved by the parties.
21 The Commission now must come in and apply federal
22 state statute and apply its best judgment weighing

1 the competing considerations and say, This is the way
2 the interconnection should occur.

3 Q Okay. Just to clarify -- just please
4 answer my question.

5 You're suggesting that XO chooses to
6 route the traffic through Neutral Tandem and by
7 virtue of that can compel Neutral Tandem and
8 Level 3 --

9 A No.

10 Q -- to establish direct interconnection?

11 A No. No, if I did -- if my answers I
12 appeared to suggest that, I do not suggest that.

13 Q Okay.

14 A The -- XO cannot compel that
15 interconnection. I believe the Commission can compel
16 that interconnection. And the Commission very well
17 may be in this case, you know, required to compel the
18 kind of interconnection.

19 Q Okay. But it's my virtue of the fact that
20 XO is making the choice --

21 A Absolute- -- I'm sorry. Again -- now I
22 have to be very careful about this.

1 If I -- if I appeared to suggest that
2 or even if I did suggest it, I did so in error. If I
3 appeared to suggest it, I did so in error.

4 Q Suggest what?

5 A XO cannot compel the nature of the
6 interconnection between you and Neutral Tandem.

7 Q Okay. You talk about the calling party
8 pays principle?

9 A Yes.

10 Q Describe that just briefly.

11 A The calling pay principle, I mean, it
12 embodied -- I think the easiest way to talk about it
13 is simply, you know, that's embodied in the recip
14 comp regime. It is, Look -- it is the calling
15 party -- the calling party has a -- you know, the
16 calling party sends the originating call over the
17 network that serves the calling party. Okay.

18 Now -- then -- and if that network
19 doesn't also -- doesn't also have the other end-user,
20 the callet party, then it's got to be handed off to
21 another network. Okay. And here's the thing --
22 here's the way I understand that, see that network

1 sitting over there that's going to be called on to
2 terminate that traffic, they don't want to do it
3 really. They're in competition with the originating
4 party. They just as soon say, Hey, I'm not going
5 to -- I'm not going to terminate that call for you.
6 You know, I don't like you. You're one of my
7 competitors. I'm not going to do it.

8 You know what, I'm going to -- this
9 calling party, I'm going to go over there and go to
10 their house and see if I can sign them up to be my
11 customer and get rid of you. Okay. They don't want
12 to do it or they love to charge a dollar a minute to
13 do it.

14 That's why they have a bottleneck on
15 that particular call to their end-user. That's why
16 the calling party network pays principle exists
17 because it says, You, terminating carrier, must
18 terminate that call, but -- and that's a heavy-duty
19 obligation. We know you don't want do it, but we're
20 going to make sure that you're properly compensated
21 for doing that.

22 Q I'll just say -- I just -- I don't disagree

1 with -- I don't agree with you that the terminating
2 party doesn't have an incentive to receive the
3 traffic, but they have customers, too.

4 But putting that aside --

5 A Yeah, but --

6 Q -- the calling party pays principle does
7 not require or mandate direct physical
8 interconnection to be implemented, correct?

9 A No, it does not. I agree with that.

10 Q And if the Commission orders direct
11 physical interconnection in this situation, will the
12 Commission -- or will Staff support the principle
13 that Level 3 should be entitled to receive
14 compensation from the originating carriers?

15 A That's in my testimony, absolutely.
16 Absolutely. I believe that -- you know, I'm a little
17 bit uncertain about the circumstance. Okay. But, in
18 my view, there is no question that if Level 3 is
19 terminating these calls, Level 3 is entitled to
20 reciprocal compensation for it.

21 And if there is a problem getting
22 it -- we have talked about this internally in the

1 last year or so -- it might make sense for the
2 Commission and/or Staff -- because we now understand
3 that there is certainly lit- -- much less
4 communication than we might have thought, there may
5 be basically no communication between the originating
6 carriers -- when you have a transit provider and you
7 have indirect connection, okay, between the ultimate
8 originating carrier and the ultimate terminating
9 carrier.

10 It may behoove us all for the
11 Commission and/or Staff to commence maybe workshops
12 or meetings or something to facilitate this payment
13 of recip comp between originating parties -- you
14 know, by originating parties to terminating parties.

15 That principle that terminating party
16 is entitled to reciprocal comp is 100 percent
17 applicable whether it's a direct or an indirect
18 comp- -- you know, connection. It makes no
19 difference the actual physical nature of the
20 interconnection.

21 Q So would you agree then that if the
22 Commission orders Level 3 to establish -- again,

1 looking at this diagram from Mr. Gates, that
2 Level 3 -- if the Commission orders Level 3 to
3 establish direct physical interconnection with
4 Neutral Tandem, that as part of the condition of
5 that, the 19 originating carrier customers of Neutral
6 Tandem should also compensate Level 3 for the
7 traffic?

8 A Well, now sitting here -- I can't say
9 sitting here right now -- I'd have to think a little
10 more.

11 I can't say that as part of the -- as
12 a condition for that. You know, if the Commission --
13 I don't know that I would say to the Commission, If
14 you're going to -- you know, This is my
15 recommendation, Commission, if you're going to order
16 that connection be maintained as a direct physical
17 connection, you should only do so as a condition of
18 that that the 19 or 18 or whatever other carriers pay
19 recip comp.

20 I don't know that I'd do that, but I
21 would certainly say this: That if then Level 3 said,
22 Okay -- you know, after that order came out said,

1 Okay, we've been -- you know what, we want to get our
2 recip comp, we're having a little bit of trouble, I
3 would certainly believe and expect that the
4 Commission and Staff would get involved to do
5 everything it could to make sure that the rules were
6 followed and that the originating carriers were
7 paying Neutral Tandem reciprocal comp.

8 And I would also say this: That's not
9 a -- that's a pretty easy thing to accomplish when
10 direct interconnections occur between the originating
11 and the terminating carrier. Okay. When we have the
12 indirect interconnections, there can be real
13 frictions, we understand that. They have a traffic
14 issue, this kind of thing. Okay.

15 If Neutral Tandem -- this is a
16 hypothetical just to show you, you know, that I
17 believe this Commission's commitment -- certainly my
18 own personal commitment as a staffer, that the recip
19 comp principle be, you know, executed.

20 If Neutral Tandem were doing something
21 or failing to do something, for example, sending the
22 required information back and forth for the billing,

1 then we would have to have discussions with Neutral
2 Tandem. If they were not doing what was required of
3 them to do that, the Commission -- I could certainly
4 see the Commission, for example, commencing a
5 proceeding against Neutral Tandem to dictate that
6 they absolutely do it.

7 I understand the frictions involved in
8 getting the payment from the carrier when it's an
9 indirect interconnection, but that does not warrant
10 trying to get the payment from the intervening
11 carrier, Neutral Tandem. We have to make the system
12 work properly.

13 Q If the Commission orders physical direct
14 interconnection between Level 3 and Neutral Tandem,
15 shouldn't the Commission also order -- and that's --
16 and that is to allow XO and the other 18 or so
17 carriers to make their choice to route their traffic
18 to Level 3, shouldn't the Commission also order, as
19 part of this proceeding, those 19 or 18 customers to
20 compensate Level 3?

21 A Not necessarily for the reason that I said
22 before and for this possibility: The Commission

1 shouldn't so order because it may be, for whatever
2 set of reasons that wouldn't necessarily be of
3 interest to the Commission, Neutral Tandem, in those
4 18 or so carriers, they might get in a room and
5 decide, You know what, let's do bill and keep. We're
6 not even going to do -- you know, that is a lawful
7 alternative.

8 Q Right. But assuming that there's no
9 agreement, shouldn't the Commission so order?

10 A If reciprocal compensation -- again, I'm
11 not going to say it should be a part of this
12 proceeding; but I will go as far as to say, if
13 reciprocal compensation is due Level 3 -- and under
14 the circumstances we're talking about, it certainly
15 would appear it's due Level 3 -- and Level 3 is
16 attempting to collect it. Level 3 says, We want our
17 money and it's not happening, the Commission -- I
18 would expected the Commission -- some sort of
19 Commission involvement and, if necessary, some sort
20 of dictate to pay reciprocal compensation.

21 Q Should Neutral Tandem be permitted to
22 terminate those carriers' customers, XO and those

1 other customers, traffic for carrier -- traffic to
2 Level 3 for a carrier who refuses to pay --

3 A No.

4 Q -- the compensation?

5 A No. The Commission -- I'd have to look
6 at Rule -- I don't know about this. Now, you're
7 at -- this is a very hypothetical and I haven't
8 looked at the rules and various statutes and all the
9 applicable things to answer this question. But a
10 carrier can't do that, but a regulator ultimately --
11 and the reason I'm hesitating a bit, that might have
12 to be the FCC, it could be this Commission. I'd have
13 to look at all that; but if a carrier is not paying
14 recip comp, refuses to do so and the recip comp is
15 duly and properly owed, the carrier is then violating
16 various provisions and some action undoubtedly would
17 be taken.

18 Q Should Neutral Tandem be a coconspirator --

19 A No.

20 Q -- in --

21 MR. HARVEY: Object to the form of the
22 question. I think the conspiracy is an illegal --

1 you know, getting together to commit an unlawful or
2 criminal act. I don't think it's an appropriate term
3 to use here.

4 MR. HARRINGTON: And, respectfully, Judge, I
5 didn't want to get involved in this, but there's
6 absolutely no evidence in the record to support that
7 question. And all of the evidence is exactly to the
8 contrary.

9 MR. KELLY: I'll withdraw the question.

10 BY MR. KELLY:

11 Q Should Neutral Tandem participate or allow
12 XO and those other carriers to route -- to make the
13 choice to route traffic through Neutral Tandem if XO
14 and those other customers refuse to compensate
15 Level 3?

16 A It's not -- if they want -- if they --
17 those originating carriers, again, choose to route
18 through Neutral Tandem as opposed to, for example,
19 the AT&T tandem, Neutral Tandem has no place -- in my
20 view, you know, would have no authority to take any
21 actions, you know, involving recip comp. They are --
22 recip comp is not their business. Okay. They have

1 nothing to do with recip comp. Okay.

2 Now, I suppose -- and, again, just
3 hypothetically, I suppose it's possible way down the
4 line, depending upon how -- you know, if you had a
5 huge dispute and, you know -- it's at least
6 theoretically possible that a regulator of the FCC or
7 the ICC might, under some circumstances -- you know,
8 to bring a recalcitrant originating carrier to heel
9 who is not paying recip comp might conceivably -- I
10 wouldn't expect this to happen, but conceivably it
11 could direct Neutral Tandem to do something as the
12 intervening carrier, but that's way far afield. And,
13 you know, that would be a last result if nothing else
14 works. I shouldn't even bring that up.

15 Q Okay. Let me ask you probably six
16 questions.

17 You would agree that the Commission
18 has declared that certain business and residential
19 end-user markets in Illinois are competitive?

20 A Yes.

21 Q In a competitive market, carriers cannot
22 pass cost increases through to the end-users?

1 You would agree with that in a
2 competitive market?

3 A In a competitive market, carriers -- I'm
4 sorry. Repeat. I didn't understand.

5 Q Competitive market carriers cannot pass
6 cost increases through to end-users in the form of
7 price increases?

8 A No, I disagree with that. The only way I'd
9 have to agree with that is if the question asked in
10 the theoretically perfectly competitive market that
11 we all know what -- you know, from our economics
12 classes, you know, a perfectly competitive market is
13 one that must meet all kinds of assumptions about a
14 perfect free flow about information, et cetera, et
15 cetera.

16 And that -- under those circumstances,
17 at least in the short run, in the short run, they
18 cannot be directly -- you know, by one carrier be
19 directly passed. Okay.

20 But as we all know, the competitive
21 markets we're talking about in telephone, this
22 network industry, are far- -- even the competitive

1 markets are far from perfectly competitive. They are
2 imperfectly competitive, some much more imperfect
3 than others. And I disagree with that.

4 In fact, we see in competitive markets
5 price increases pass through to customers all the
6 time.

7 Q You would agree that the transport and
8 tandem markets in Illinois are competitive, correct?

9 MR. HARVEY: Do you mean competitive in the
10 economic sense or competitive in the sense of having
11 been so declared by the Commission?

12 MR. KELLY: Competitive.

13 THE WITNESS: The transport and --

14 BY MR. KELLY:

15 Q Transit.

16 The transport market is competitive?

17 A You know, sitting here, I don't
18 think from -- in the sense that Mr. Harvey said, are
19 they declared competitive by the PUA or the
20 Commission? I don't know that for sure. I suspect
21 that is the case, but I don't know that for certain.

22 Q If -- I'm talking back just real quickly

1 about reciprocal compensation and calling party pays
2 principle, if Level 3 had additional costs of
3 interconnection not covered by reciprocal
4 compensation, you would agree that Level 3 should be
5 entitled to recover those costs for termination?

6 I mean -- strike that. That's a bad
7 question.

8 A Are you talking about interconnection
9 costs?

10 Q Yes.

11 Given that qualification --

12 A Right.

13 Q -- wouldn't you agree with that?

14 A Right. Absolutely, that is...

15 Q Thank you.

16 A Yeah, Level 3 is entitled to appropriate,
17 you know, coverage -- there's appropriate allocation
18 of the costs involved in interconnection.

19 If inappropriate costs are being
20 imposed upon Level 3 as the result of the
21 interconnection -- and by "inappropriate costs," I
22 mean costs associated with that interconnection --

1 Level 3 should, you know, as a first step, let Staff
2 know and, perhaps, ultimately let the Commission
3 know; but because of -- if those costs are being
4 inappropriately imposed upon you, that would be
5 something -- and they can't be negotiated out of and,
6 you know, you're at an impasse, that would be
7 something the Commission -- as I've said before, that
8 would be -- if those were being imposed upon you,
9 that would be -- I think the Commission would
10 conclude that's probably not in the public interest
11 and would look at that.

12 MR. KELLY: Thank you. No further questions.

13 JUDGE BRODSKY: Okay. Now, at this point, I
14 would take lunch, but let me first find out whether
15 there's redirect.

16 MR. HARVEY: We will be able to tell you one in
17 minute. We will be able to tell you now.

18 There is no redirect.

19 JUDGE BRODSKY: Okay. Well, if that's the
20 case, is there anything further for today?

21 MR. HARVEY: Staff has nothing further and
22 offers no further evidence in this case, your Honor.

1 MR. HARRINGTON: Nor does Neutral Tandem, your
2 Honor.

3 JUDGE BRODSKY: Anything from Level 3?

4 MR. KELLY: Yes, nothing.

5 JUDGE BRODSKY: Well, then that makes that
6 easy.

7 The -- before we adjourn the hearing,
8 let's remind all parties about the deadlines and
9 limitations that were discussed about the briefs at
10 the beginning of yesterday. And so I look forward to
11 seeing the briefs and those timetables, and to the
12 extent that it is appropriate or needed, any
13 posttrial motions sometime during that period.

14 Unless there's anything further, we
15 are adjourned.

16 MR. HARVEY: Thank you very much, your Honor.

17 MR. KELLY: Thank you, your Honor.

18 (Whereupon, the above-entitled
19 matter was continued sine die.)
20
21
22